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This Article presents a theory of customary international law ("CIL") that seeks to resolve the many well-known difficulties with standard accounts of CIL. The theory uses simple game theoretical concepts to explain how CIL arises, why nations "comply" with CIL as commonly understood, and how CIL changes. This theory rejects the usual explanations of CIL based on opinio juris, legality, morality, and related concepts. States do not comply with norms of CIL because of a sense of moral or legal obligation; rather, their compliance and the norms themselves emerge from the states' pursuit of self-interested policies on the international stage. In addition, the behaviors associated with CIL do not reflect a single, unitary logic. Instead, they reflect various and importantly different logical structures played out in discrete, historically contingent contexts. Finally, the theory is skeptical of the existence of multilateral behavioral regularities that are typically thought to constitute CIL.

The Article tests the theory using case studies from three traditional areas of CIL: neutrality, diplomatic immunity, and maritime jurisdiction. The authors find that most rules of CIL reflect pure coincidence of interest, rather than international cooperation, and that the rest are best explained as the outcome of repeated bilateral prisoner's dilemmas or coercion analogous to the behavior of the monopolist in predatory pricing games. The Article concludes by examining the implications of this analysis for understanding the role of CIL in domestic constitutional arrangements, the function of international treaties and international organizations, and the status of modern international human rights law.

Customary international law ("CIL") is one of two primary forms of international law, the other being the treaty. CIL is typically defined as a "general and consistent practice of states followed by them from a sense of legal obligation."[1] Conventional wisdom views CIL as a unitary phenomenon that pervades international relations. Governments take care to comply with CIL and incorporate its norms into domestic statutes. National courts apply CIL as a rule of decision, or a defense, or a canon of statutory construction. Nations argue about whether certain acts violate CIL. Violations of CIL are grounds for war or international claims. Legal commentators view CIL to be at the core of the study of international law.

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[1] Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (ALI 1987) ("Restatement (Third)").

And yet CIL remains a puzzle. It lacks a centralized lawmaker, a centralized executive enforcer, and a centralized, authoritative decisionmaker. The content of CIL seems to track the interests of powerful nations. The origins of CIL rules are not understood. We do not know why nations comply with CIL, or even what it means for a nation to comply with CIL. And we lack an explanation for the many changes in CIL rules over time. CIL's standard definition raises perennial, and unanswered, questions. It is unclear which state acts count as evidence of a custom, or how broad or consistent state practice must be to satisfy the custom requirement. It is also unclear what it means for a nation to follow a custom from a sense of legal obligation, or how one determines whether such an obligation exists.

This Article presents a theory of CIL that seeks to sort out these and many other difficulties with the standard account of CIL. The theory uses simple game theoretical concepts to explain how CIL arises, why nations "comply" with CIL as commonly understood, and how CIL changes.[2]

After briefly describing conventional wisdom about CIL in Section I, we present our theory in Section II. This theory views the international behaviors traditionally associated with a unitary CIL as variations on one of four different behavioral logics. The first such logic is *coincidence of interest*, where behavioral regularities result from the private advantage that each state obtains from the same action, regardless of the action taken by others. The second is *coercion*, where a powerful state (or coalition of states with convergent interests) forces or threatens to force other states to engage in acts that they would not do in the absence of

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[2] Our approach has many affinities with the rational choice school in international relations. See James D. Morrow, *Modeling the forms of international cooperation: distribution versus information*, 48 Intl Org 387 (1994) (using game theory to identify equilibria where international actors can benefit by sharing information); Kenneth A. Oye, ed, *Cooperation Under Anarchy* (Princeton 1986); Duncan Snidal, *Coordination versus Prisoner's Dilemma: Implications for International Cooperation and Regimes*, 79 Am Pol Sci Rev 923 (1985). In recent years, international law scholarship has begun to borrow heavily from the international relations literature. See Jeffrey L. Dunhoff and Joel P. Trachtman, *Economic Analysis of International Law: Microanalysis of Macro-Institutions*, 24 Yale J Intl L 1 (1999); Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 Am J Intl L 367 (1998). However, this literature contains no comprehensive analysis of customary international law through the lens of rational choice, game theory, and related approaches. Michael Byers' recent book considers CIL from an international relations perspective, but barely considers game theory. See Michael Byers, *Custom, Power, and the Power of Rules: International Relations and Customary International Law* (Cambridge 1999). Fernando Tesón briefly sketches a game-theoretic account of CIL in order to criticize it on positive and especially normative grounds. See Fernando R. Tesón, *A Philosophy of International Law* 74-77 (Westview 1998).

such force. The third is *true cooperation.* These cases are best modeled as a bilateral, iterated prisoner's dilemma in which two states receive relatively high payoffs over the long term as long as both states resist the temptation to cheat in the short term. The fourth situation arises when states face and solve bilateral *coordination* problems. In these cases, if states coordinate on identical or symmetrical actions, they receive higher payoffs than if they do not coordinate.

Our theory suggests that international behavioral regularities associated with CIL may reflect coincidence of interest or coercion. These cases have no normative content, for states independently pursue their self-interest without generating gains from interaction. The theory also suggests that some international behavioral regularities associated with CIL will reflect cooperation or coordination, but these regularities will arise in bilateral, not multilateral, interactions.

Our theory differs from the standard conception of CIL in several fundamental respects. It rejects the usual explanations of CIL based on legality, morality, and related concepts. States do not comply with CIL because of a sense of moral or legal obligation; rather, CIL emerges from the states' pursuit of self-interested policies on the international stage. In addition, our theory rejects the traditional claim that the behaviors associated with CIL reflect a unitary logic. These behaviors instead reflect different logical structures that describe discrete, historically contingent contexts. Finally, our theory is skeptical of the existence of multilateral behavioral regularities that are typically thought to constitute CIL. It holds that multinational regularities will reflect coincidence of interest or coercion, and that regularities that reflect cooperation or coordination arise only in bilateral contexts.

Section III tests the theory using case studies from three traditional areas of CIL: neutrality, diplomatic immunity, and maritime jurisdiction. These rules of CIL are, according to conventional accounts, among the most robust that exist. The case studies show that international behaviors said to constitute CIL are not multilateral customary practices, but rather are disparate and changing practices that follow different logics depending on the interaction of state interests. The case studies also suggest that the behaviors associated with CIL do not reflect a unitary underlying logic, and that CIL does little apparent work in guiding national behavior. They also reveal how commentators and courts commit errors of induction in moving from the observation of a behavioral regularity to the conclusion that a CIL rule exists. In addition, the case studies demonstrate that courts and com-

mentators rely too heavily on what nations say at the expense of what they do and why, and they tend to limit CIL to behavioral regularities that are "good" from their normative perspective, denigrating regularities that are bad as "comity" or a violation of, or an exception to, the CIL rule.

Finally, Section IV discusses the implications of our theory for other issues of international law, including the role of domestic courts in enforcing CIL, the significance of treaties, and the meaning of modern international human rights law.

I. STANDARD VIEWS OF CIL

The treaty and CIL are the two primary forms of international law. Because they lack a centralized judicial and enforcement regime, and because violations often go unpunished, many scholars doubt that treaties and CIL establish genuine legal obligations. CIL suffers additional doubts about its legitimacy that do not burden treaties. Treaties are express promises that are almost always embodied in written form; they often have built-in dispute resolution mechanisms such as international arbitration; and they only bind signatories. By contrast, CIL is unwritten; it is said to arise spontaneously from the decentralized practices of nations; the criteria for its identification are (as we shall explain more fully below) unclear; and it is said to bind all nations in the world. Nonetheless, conventional wisdom holds that the obligations created by CIL bind nations with the same force as treaties.[3]

CIL is typically defined as the collection of international behavioral regularities that nations over time come to view as binding as a matter of law.[4] This standard definition contains two elements. There must be a widespread and uniform practice of nations. And nations must engage in the practice out of a sense of legal obligation. This second requirement, often referred to as *opinio juris*, is the central concept of CIL. Because *opinio juris* refers to the reason why a nation acts in accordance with a behavioral regularity, it is often described as the "psychological" element of CIL.[5] It is what distinguishes a national act done voluntarily or out of comity from one that a nation follows because it is required to do so by law. Courts and scholars say that a long-

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[3] See Restatement (Third) § 102, comment j.

[4] See id § 102(2); Statute of the International Court of Justice, Art 38(1)(b), 59 Stat 1031, 1061, Treaty Serial No 993 (1945).

[5] See Ian Brownlie, *Principles of Public International Law* 7-9 (Clarendon 4th ed 1990); Anthony A. D'Amato, *The Concept of Custom in International Law* 47-55, 66-73 (Cornell 1971).

standing practice among nations "ripens" or "hardens" into a rule of CIL when it becomes accepted by nations as legally binding.[6]

This standard account of CIL suffers from well-known difficulties.[7] There is little agreement about which types of national actions count as state practice. Policy statements, national legislation, and diplomatic correspondence are the least controversial sources. Treaties—especially multilateral treaties, but also bilateral ones—are often used as evidence of CIL, but in an inconsistent and undertheorized way. The writings of jurists are a common but highly tendentious source of CIL. Even more controversially, United Nations General Assembly Resolutions and other nonbinding statements and resolutions by multilateral bodies are often viewed as evidence of CIL. Those who study and use CIL—courts, arbitrators, diplomats, politicians, scholars—invoke these sources selectively.

There is similar disagreement about how widespread and uniform state practice must be. In theory, the practice is supposed to be general in the sense that all or almost all of the nations of the world engage in it. But it is practically impossible to determine whether 190 or so nations of the world engage in a particular practice. Thus, CIL is usually based on a highly selective survey of state practice that includes only major powers and interested nations.[8] Increasingly, courts and scholars ignore the state practice requirement altogether.[9] For example, they refer to a CIL prohibition on torture at the same time that they acknowledge that many nations of the world torture their citizens.[10] It is thus unclear when, and to what degree, the state practice requirement must be satisfied.

The *opinio juris* requirement raises more problems. Courts and scholars sometimes infer it from the existence of a wide-

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[6] See, for example, *The Paquete Habana*, 175 US 677, 686 (1900) ("By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels . . . have been recognized as exempt . . . from capture as prize of war.").

[7] See D'Amato, *The Concept of Custom* at 6-10 (cited in note 5); David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 German Year Book Intl L 198 (1996).

[8] See Karol Wolfke, *Custom in Present International Law* 81-82 (Wroclaw 1964); Jonathan I. Charney, *Universal International Law*, 87 Am J Intl L 529, 537 (1993).

[9] See Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv L Rev 815, 839-40 (1997) (citing examples).

[10] See *Filartiga v Pena-Irala*, 630 F2d 876, 882 (2d Cir 1980); Bruno Simma and Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Austrl Year Book Intl L 82, 90-93 (1992).

spread behavioral regularity.[11] But this makes *opinio juris* redundant with the state practice requirement, which, by assumption, is insufficient by itself to establish CIL. To avoid this problem, courts and scholars sometimes require independent evidence of *opinio juris*, such as a statement by an important government official, ratification of a treaty that contains a norm similar to the CIL norm in question, or an attitude of approval toward a General Assembly Resolution.[12] The appropriate conditions for the use of such evidence are unsettled. In addition, there is no convincing explanation of the process by which a voluntary behavioral regularity transforms itself into a binding legal obligation.[13] *Opinio juris* is described as the psychological component of CIL because it refers to an attitude that nations supposedly have toward a behavioral regularity. The idea of *opinio juris* is mysterious because the legal obligation is created by a nation's belief in the existence of the legal obligation.[14] *Opinio juris* is really a conclusion about a practice's status as international law; it does not explain *how* a widespread and uniform practice becomes law.

We have described some of the many uncertainties that bedevil the standard conception of CIL. These problems are well known. They are the subject of an enormous literature that endlessly (and in our opinion unproductively) debates definitional issues, the relative significance of practice and *opinio juris*, and other conceptual matters internal to the traditional account. Although our theory has implications for many of these issues, they are not the focus of our analysis. Instead, we focus on two sets of issues that are rarely discussed in the international law literature, but that are fundamental to understanding CIL.

First are the unarticulated assumptions that underlie the traditional conception of CIL. Despite the many disagreements within the traditional paradigm, the parties to this debate assume that CIL is *unitary*, *universal*, and *exogenous*. CIL is unitary in the sense that all the behaviors it describes have an identical logical form. CIL is universal in the sense that its obligations bind all nations except those that "persistently object" dur-

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[11] See Brownlie, *Principles of Public International Law* at 7 (cited in note 5) (citing examples).

[12] Id at 7-9 (citing examples).

[13] For a catalogue of failed attempts, see D'Amato, *The Concept of Custom* at 47-56, 66-72 (cited in note 5).

[14] D'Amato calls this the circularity problem of *opinio juris*. Id at 66 ("How can custom create law if its psychological component requires action in conscious accordance with law preexisting the action?"). He analyzes the many futile attempts to avoid this paradox. Id at 47-56, 66-68.

ing the development of the CIL norm.[15] And CIL is exogenous in the sense that it represents an external force that influences national actions. Our theory of CIL challenges each of these assumptions.

The second set of issues concerns the traditional paradigm's inability to explain international behavior. The traditional paradigm does not explain how CIL emerges from disorder,[16] or how it changes over time.[17] For example, the CIL rule governing a nation's jurisdiction over its coastal seas changed from a cannonshot rule to a three-mile rule to a twelve-mile rule with many qualifications.[18] On the traditional account, the process of change is illegal, since some states must initiate a departure from the prior regularity that they were bound to follow as a matter of law. More broadly, the traditional account cannot explain why CIL changes in response to shifts in the relative power of nations, advances in technology, and other exogenous forces.

The traditional account also cannot explain the fact that nations frequently change their views about the content of CIL, often during very short periods of time. Nor, relatedly, can it explain why national courts and politicians almost always apply a conception of particular CIL norms that are in the nation's best interest. In addition, it does not explain why nations often say that they will abide by a particular norm of CIL and then violate their promises. Finally, the traditional account does not explain why nations comply with CIL.

There are, to be sure, numerous general theories of why nations obey international law.[19] The large majority of these theories focus exclusively on, and have relevance only for, treaties.[20] But some apply to treaties and CIL alike. Some positivist theorists argue that nations obey international law—including CIL—because they *consent* to it.[21] But, as many have noted, this posi-

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[15] See Restatement (Third) § 102, comment d.

[16] See D'Amato, *The Concept of Custom* at 4 (cited in note 5).

[17] See id; G.J.H. van Hoof, *Rethinking the Sources of International Law* 97-105 (Kluwer Academic 1983).

[18] This is a simplification. We explore this rule more fully in Section III.C.

[19] For surveys, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L J 2599 (1997); Oscar Schachter, *Towards a Theory of International Obligation*, 8 Va J Intl L 300, 301 (1968).

[20] See, for example, Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* 1-28 (Harvard 1995). In addition, all of the recent empirical work on compliance with international law has focused on treaties rather than CIL. See Koh, 106 Yale L J at 2599 n 2 (cited in note 19). For our account of why treaties might foster international cooperation more successfully than CIL, see Section IV.B.

[21] See J.L. Brierly, *The Law of Nations: An Introduction to the International Law of*

tion begs the question of why nations abide by the international rules to which they have consented.[22] A prominent theory in the natural law tradition contends that nations abide by CIL because "they perceive the rule and its institutional penumbra to have a high degree of legitimacy," where legitimacy is understood as "a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."[23] Another prominent theory argues that "repeated compliance [with international law] gradually becomes habitual obedience" as international law "penetrates into a domestic legal system, thus becoming part of that nation's internal value set."[24] Yet another prominent theory, while nodding to the idea of self-interested national behavior, mainly explains international compliance on the basis of morality and the "habit and inertia of continued compliance."[25] "Right process," "value set," "habit," and "morality" are empty phrases in these theories. They stand in for the concept of *opinio juris* without explaining what it means. There are scores of other theories of international law compliance,[26] but they suffer from similar difficulties.

II. A THEORY OF CIL

This Section sets forth our theory of CIL. The theory uses simple game theoretical concepts to explain international behavioral regularities as a function of national self-interest.[27] We are not, of course, the first to invoke the idea of national self-interest to explain the rules of international law.[28] But this idea is in-

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Peace 51-54 (Clarendon 6th ed 1963).

[22] See id.

[23] Thomas M. Franck, *The Power of Legitimacy among Nations* 24-25 (Oxford 1990).

[24] Koh, 106 Yale L J at 2603 (cited in note 19).

[25] Louis Henkin, *How Nations Behave* 49, 58-63 (Columbia 2d ed 1979). The rational choice strand of international relations attempts to explain international cooperation without falling back on notions of morality or *opinio juris*. See sources cited in note 2. As we explained, this is the tradition in which we are working, a tradition that has not to date been invoked to account for CIL.

[26] Schachter, 8 Va J Intl L at 301 (cited in note 19), lists thirteen theories. Koh, 106 Yale L J at 2599 (cited in note 19), canvasses dozens.

[27] For more detailed discussions of the game theoretic concepts that we draw on, see Douglas G. Baird, Robert H. Gertner and Randal C. Picker, *Game Theory and the Law* (Harvard 1994), which shows how game theory can be used to understand law (but does not discuss international law), and James D. Morrow, *Game Theory for Political Scientists* (Princeton 1994), which shows how game theory can be used to understand international relations (but does not address international law).

[28] See, for example, Lassa Oppenheim, *International Law* 4-8 (Longmans 1905).

voked all too often in a vague and conclusory fashion; we aim here to use game theory to provide a more rigorous account of how CIL might emerge from self-interested international behavior.

Several words of caution are in order. First, we use game theoretical concepts only to organize our ideas and intuitions and to clarify the assumptions made by us and those we criticize. We do not claim that the axioms of game theory accurately represent the decisionmaking process of a "state" in all its complexity.[29] Because the premises of the theory are relatively crude, the theory's predictions lack nuance. But a theory is successful if it provides a more coherent and plausible account of behavior than rival theories do, and if it allows one to see old problems in new and fruitful ways.[30] The success of our argument, then, depends on both its theoretical plausibility (the subject of this Section) and empirical verification (the subject of the next Section).

Second, the theory is positive, not normative. We do not take a position on the normative value of international law. Third, the theory takes no position on the jurisprudential issue of whether international law is really "law." Relatedly, although we express doubts about the robustness of CIL, we are not therefore committed to thinking that domestic law is not robust. The purpose of our argument is not to define law, but to explain international behavior and its relationship to what people call "customary international law."

A. The Basic Model

What courts and scholars call CIL refers to certain behavioral regularities that emerge in international games played among states. In this Section, we describe the four strategic positions that we believe capture the behavioral regularities thought to constitute CIL. The analysis uses as its main example the CIL rule at issue in the famous *Paquete Habana*[31] decision, which held that CIL prohibited a state from capturing a coastal fishing vessel owned by civilians of an enemy state. For expository clarity, we initially discuss possible explanations for this rule of CIL in interactions between two states. We then discuss the extent to which the conclusions of this discussion can be extended to inter-

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[29] We explore this issue further in Section IV.A.

[30] For a discussion of the advantages and limitations of using game theory to analyze international relations, see Duncan Snidal, *The Game* Theory *of International Politics*, in Oye, ed, *Cooperation Under Anarchy* 25 (cited in note 2).

[31] 175 US 677 (1900).

actions among more than two states. Finally, we explain how the basic model differs from the traditional conception of CIL.

1. Coincidence of interest.

The first strategic position is one of *coincidence of interest*, where states engage in behavioral regularities simply because each obtains private advantages from a particular action (which happens to be the same action taken by the other state) irrespective of the action of the other. Table 1 illustrates such a situation.

Table 1

		State i	
		attack	ignore
State j	attack	-2, -2	-1, 2
	ignore	2, -1	3, 3

Table 1 might describe the position of two belligerent states that have navies that patrol a body of water also used by civilian fishing boats from both states. A state's naval vessels are expensive to operate and have important uses (such as protecting the state from invasion), and the fishing boats are not worth very much. It follows that each state does best if it ignores the fishing boats of the other (represented by a payoff of 3 for each state). If a state instead attacks the boats of the other state, we assume that it incurs a loss of 4, so that its payoff is -1 (3 – 4). If the first state's boats are attacked, it incurs an additional loss of 1, so that its payoff is -2. If a state's boats are attacked, but it does not itself attack the boats of the other state, it loses 1 but it does not incur the loss of 4, so its payoff is 2 (3 – 1).

To determine the equilibrium of the game, assume first that one player ("state j") attacks the boats of the other player ("state i"). State i obtains a higher payoff (2) if its navy ignores the fishing boats of state j than if it attacks and seizes these boats (-2). Now assume that state j ignores the boats of state i. State i obtains a higher payoff if it ignores (3) than if it attacks (-1). Accordingly, state i ignores state j's boats regardless of state j's behavior. Because state j's payoffs are symmetric to state i's, state j ignores state i's boats as well. Thus, in equilibrium, each state ignores the boats of the other state. By an "equilibrium" we mean that the two states will continue engaging in this behavior as long as the underlying payoffs do not change. Thus, when an

equilibrium occurs, one would observe a behavioral regularity—in this case, a behavioral regularity consisting of each state ignoring the boats of the other.

This behavioral regularity is one possible explanation for what is referred to as CIL.[32] Notice that the states act according to their self-interest. Although an observer might applaud the outcome because the states refrain from belligerence (and therefore seem to be cooperating or obeying some sort of rule), the outcome is no more surprising than the fact that states do not sink their own ships. States independently pursuing their own interests will engage in symmetrical or identical actions that do not harm anyone, simply because they gain nothing by deviating from those actions.

2. Coercion.

A second strategic position in which states find themselves can be called *coercion*. One state, or a coalition of states with convergent interests, forces other states to engage in actions that serve the interest of the first state or states. To understand this strategic situation, imagine a game in which a large and powerful state initially can threaten to punish any small state that engages in any action X. The cost of punishing the small state is trivial. The small state then chooses to engage in the action or not, and the large state responds by punishing the small state or not. The game then repeats itself. The large state receives its highest payoff if the small state does not engage in X. The small state receives a higher payoff if it does not engage in X and is not punished than if it does engage in X and is punished. In equilibrium the large state makes the threat, the small state does not engage in X, and the large state does not punish the small state. The small state does not deviate because the large state would punish it if it did. The threat of punishment is most credible when the cost of punishing the small state is low.[33]

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[32] Compare Kenneth A. Oye, *Explaining Cooperation under Anarchy: Hypotheses and Strategies*, in Oye, ed, *Cooperation Under Anarchy* 1 (cited in note 2). Oye argues that states often obtain mutual gains by acting independently, and refers to the classical liberal defense of free trade, according to which every state does best if it eliminates tariffs, regardless of whether other states do. The example is slightly misleading because gains exist only against the implicit baseline of protectionism. Our example of states not sinking their own ships is formally identical, except self-interest leads to maintenance of the status quo, rather than "mutual gains," except in the most attenuated sense.

[33] This game is based on models of entry deterrence through predatory pricing in industrial organization. In those models, a firm or entrepreneur must decide whether to enter a market dominated by a monopolist, and then the monopolist must decide whether to retaliate by cutting prices and expanding production. Several different models show that

As an example, suppose that state i, a large and powerful nation, wishes to prevent small state j from attacking i's civilian fishing boats. State i threatens state j by announcing that if state j does not stop its attacks, state i will destroy j's navy. If state i cares enough about preventing j's attacks, and the cost of punishing state j is low enough, state i's threat will be credible, and state j will cease attacking the fishing vessels. If, because it has better uses for its navy, state i does not attack state j's fishing boats, then observers will perceive a behavioral regularity consisting of states i and j not attacking each other's civilian fishing boats. They may conclude that a rule of CIL prohibits the seizure of fishing boats. But this harmonious result is produced by force. Indeed, the application of force is more obvious when the weak party is passive. For example, state i might seize colonies of state j and threaten j with destruction if j resists. Observers might hesitate about calling the outcome a norm of CIL, but the structure of the game is identical to that of the first example.

Coercion and coincidence of interest differ according to the degree to which a state's best action depends on the action of the other state. Coincidence of interest exists when a state's payoff from an action is independent of the action of the other state. Coercion exists when the strong state's payoff depends on the weak state's action, and the strong state would punish the weak state if the weak state chose the action that does not maximize the strong state's payoff.

3. Cooperation.

The third strategic position in which states find themselves is that of the bilateral repeat prisoner's dilemma. Table 2 illustrates one stage of such a game.

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the monopolist can deter entry either by making a credible threat that it will cut prices or by in fact cutting prices prior to entry. In the simplest model, which we use in the text, the monopolist cuts prices after entry in order to show future entrants that it will retaliate. In another model, some monopolists are irrational (or prone to bad judgment) and others are rational; irrational monopolists retaliate by cutting prices in the second period, while rational monopolists mimic the irrational monopolist in order to deter future entrants. In a signaling model, the entrant does not know whether the monoplist has high or low costs, and the low-cost monopolist signals its costs by charging low prices. In international relations, the analogies would be (i) powerful states sometimes being spiteful or irrational and attacking weak states that do not do their bidding, even though the cost of attacking them exceeds the benefit of successful coercion in a single round; or (ii) some powerful states having cheaper and more effective militaries than others and occasionally engaging in gratuitous displays of military might in order to reveal this private information to weaker countries. For discussions of the predatory pricing literature, see Baird, Gertner and Picker, *Game Theory and the Law* at 178-86 (cited in note 27), and Jean Tirole, *The Theory of Industrial Organization* 367-74 (MIT 1988).

Table 2

		State i: attack	State i: ignore
State j	attack	2, 2	4, 1
State j	ignore	1, 4	3, 3

Recall that the coincidence of interest example (Table 1) also assumes that each state receives 3 if both states ignore the fishing boats of the other. But while the earlier example assumed that states lose 4 when they attack boats, because this strategy is a waste of naval resources, the example here assumes that a state gains 1 when it attacks boats, holding constant the response of the other state. So a state's payoff increases from 3 to 4 if it attacks the boats of a state that plays "ignore," while its payoff increases from 1 to 2 if it attacks the boats of a state that plays "attack" (see Table 2). The payoffs in Table 1, where there is a coincidence of interest, describe conditions under which naval resources are expensive, fishing boats have little value to an enemy, and fishing plays a minor role in an economy. The payoffs in Table 2, where there is a prisoner's dilemma, describe conditions under which naval resources are cheaper, fishing boats are valuable as prizes, and fishing plays an important role in an economy.

The analysis of the prisoner's dilemma is familiar. State i obtains a higher payoff from seizing state j's fishing boats, regardless of whether state j also seizes state i's boats ($2 > 1$) or not ($4 > 3$). State j's payoffs are symmetrical. Therefore, if Table 2 describes the whole game, and there is no possibility of future action or international sanctions, both states will seize the fishing boats of the other, and the jointly minimizing outcome is obtained.

When the prisoner's dilemma is repeated over an indefinite period of time, however, the optimal outcome (ignore, ignore) becomes possible in each round.[34] If the states expect to interact over time, it is possible that each state will ignore the other state's fishing boats in period n+1 as long as there were no attacks (i.e., "cooperation") in period n. However, if one state did attack the other's boats (i.e., "cheat") in period n, the victim will not cooperate in period n+1 or in any future period. This strategy can

[34] See Baird, Gertner and Picker, *Game Theory and the Law* at 164-72 (cited in note 27); Robert Gibbons, *Game Theory for Applied Economists* 82-99 (Princeton 1992).

yield cooperation over time, as long as several conditions are satisfied.[35] We focus here on the three most relevant to our analysis.

First, the players must have sufficiently low discount rates: that is, they must care about the future relative to the present.[36] Individuals who are impulsive or impatient or who do not care about the future have high discount rates. Because such individuals value the short term gains from cheating over the discounted long term gains from cooperation, they cannot sustain cooperative relationships with others. The international analogy to the impulsive individual is the *rogue state.* Rogue states are states controlled by irrational or impulsive leaders, or states with unstable political systems, or states in which citizens do not enjoy stable expectations. Such states can be modeled as having high discount rates.

Second, the game must continue indefinitely, in the sense that players either expect it never to end or to end only with a sufficiently low probability.[37] Care should be taken when determining the "end" of a game. Norms of war (such as the humane treatment of prisoners) might exist because (a) belligerents foresee interaction ceasing at the end of the war but do not know when the war will end, and so refrain from "cheating" during the war (by, for example, killing prisoners) in the expectation that the enemy will do the same; or (b) belligerents foresee interaction continuing after the war ends, and fear that "cheating" during the war may invite retaliation after the war. Analyses of customs between states, such as their treatment of each other's civilian fishing vessels, should not overlook the influence of future interaction between the states outside the narrow context of the game.

Third, the payoffs from defection must not be too high relative to the payoffs from cooperation. Because payoffs may change over time, a relationship may succeed for a while and then, after a sudden change in payoffs, collapse.

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[35] The conditions examined in the paragraphs that follow are standard in the game theory literature. For more detailed discussions, see Baird, Gertner and Picker, *Game Theory and the Law* at 164-72 (cited in note 27); Morrow, *Game Theory for Political Scientists* at 260-79 (cited in note 27).

[36] Discount rate refers to the degree to which a person prefers current payoffs to future payoffs. Suppose a person expects to receive 100 dollars in one year. A person with a high discount rate of, say, 0.5 is indifferent between that amount in one year and about 67 dollars today. A person with a low discount rate of, say, 0.1 is indifferent between that amount in one year and about 91 dollars today. See Gibbons, *Game Theory for Applied Economists* at 68-69 n 7 (cited in note 34).

[37] In more sophisticated analyses, this is not required: it is sufficient if players believe the game will not end for a long time and there is a small probability that a player is irrational or will make an error. See Morrow, *Game Theory for Political Scientists* at 279-91 (cited in note 27).

The bilateral prisoner's dilemma results in a jointly maximizing outcome only if the above three conditions are met. By contrast, the coincidence of interest case results in a jointly maximizing outcome regardless of whether these conditions are met. Thus, the value-maximizing equilibrium in the bilateral prisoner's dilemma is not as robust as that in the coincidence of interest case. But it is not banal. When it occurs, it reflects true international cooperation.

The bilateral repeat prisoner's dilemma differs from the coercion case along two dimensions. First, the cooperative equilibrium (in the prisoner's dilemma) depends on mutual threats of deviation rather than the powerful state (as in the coercion game) unilaterally threatening to punish the weaker state. Second, in the prisoner's dilemma both states prefer the cooperative equilibrium that is sustained by mutual threats over the equilibrium that results when both states deviate. In contrast, in the coercion game the powerful state prefers the equilibrium sustained by its threats, and the weaker state prefers the equilibrium in which the threat is not credible and not carried out. Everything else being equal, the coercion equilibrium might seem more robust than the cooperative equilibrium, because the former requires only the powerful state's threat to be credible while the latter requires both states' threats to be credible.

4. Coordination.

The fourth strategic position in which states find themselves is one of *coordination.* In the simplest form of this game, the states' interests converge, as in the case of coincidence of interest; but unlike the latter case, each state's best move depends on the move of the other state. Consider Table 3.

Table 3

		State i	
		action X	action Y
State j	action X	3, 3	0, 0
	action Y	0, 0	3, 3

Each state prefers to engage in X if the other state engages in X, and each state prefers to engage in Y if the other state engages in Y. There are two desirable equilibria: {X, X} and {Y, Y}. Once the states coordinate on one action, neither state will devi-

ate. The main problem is the first move. If state i does not know whether state j will choose X or Y, then state i does not know whether to choose X or Y. Both states might choose their first and subsequent moves at random, resulting in a mixed-strategy equilibrium in which the parties fail to obtain the full gains from coordination.[38]

A simple example is coordination on a border between two states. Suppose that action X is "patrol up to the river," and action Y is "patrol up to the road." The river and road cross but divide the territory evenly. The states are indifferent whether the river or the road should divide their territories, but they want to avoid conflicts between their patrols. Once it is established that the equilibrium action is X (or Y), neither state will deviate from that action. To see why, suppose that state i knows that state j engages in X. Then state i does better by also engaging in X than by engaging Y. If instead state i knows that state j engages in Y, state i does better by engaging in Y than by engaging in X.

Coordination problems also arise in the course of solving the repeat prisoner's dilemma. Although repeat play can overcome the incentives to cheat in one round of the prisoner's dilemma, there remains a problem of identifying which moves count as cooperative moves and which moves count as defections. For example, part of state i's and state j's problem in overcoming the incentives to seize each other's fishing vessels involves identifying which seizures are permitted and which are not permitted. Can one seize a fishing vessel if it contains spies? What if the sailors are not spies but have observed secret maneuvers? A repeated prisoner's dilemma, when discount rates are low enough, is not the same thing as a one-shot prisoner's dilemma; it is instead a kind of coordination game.[39]

5. On the possibility of multinational CIL norms.

One of the central claims of the standard account of CIL—what we have called the "universality" claim—is that CIL norms govern all or almost all states, or at least all "civilized" states.

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[38] For a discussion, see Baird, Gertner and Picker, *Game Theory and the Law* at 37-39 (cited in note 27).

[39] There are many variations on the pure coordination game. One equilibrium might produce higher payoffs for both parties than the other; then coordination may be easy. Or each party does better in a different pure-strategy equilibrium, in which case coordination may be very difficult. This is the "Battle of the Sexes" game. Morrow analyzes the treaty on wireless communications as a Battle of the Sexes game, because all states preferred coordinating on some standard rather than on none, but some standards benefited certain states more than others. See Morrow, 48 Intl Org at 388-92 (cited in note 2). See also notes 111 and 168 below (discussing the Battle of the Sexes game).

Our theory suggests that many apparently cooperative universal behavioral regularities are illusory. Suppose, for example, that we observe that no state seizes civilian fishing vessels from enemies in times of war. Our theory contemplates many possible explanations for this observation based on some combination of the four games described above.

First, nations might not seize boats because their navies are used more effectively by attacking enemy warships or large merchant vessels. This is coincidence of interest. Second, many nations receive no benefit from seizing fishing boats (coincidence of interest), and the few nations that would benefit from seizing fishing boats are deterred from doing so by powerful nations that want to prevent seizures of their own boats (coercion). Third, two nations decline to seize each other's fishing boats in a bilateral repeat prisoner's dilemma, and all the other nations decline to do so because of coincidence of interest or coercion. Or it may be that the other nations also face each other in exclusive bilateral repeat prisoner's dilemmas and therefore refrain from seizing fishing vessels because they fear retaliation from their (single) opponents. (This might occur if all bodies of water containing fish under the conditions described above are bordered by exactly two states.) Fourth, some or all nations face each other in bilateral coordination games that they solve, and any other nations engage in the same action because of coincidence of interest, coercion, or a bilateral repeat prisoner's dilemma.

There are numerous other possible combinations of coincidence of interest, coercion, bilateral prisoner's dilemmas, and bilateral coordination. In all these cases, some states refrain from seizing fishing vessels because they have better uses for their navy, or because they fear retaliation from the state whose fishing vessels they covet. In none of these cases does *multilateral cooperation* occur. To explain our skepticism about the spontaneous evolution of CIL rules reflecting multilateral cooperation, we focus on the assumptions necessary to explain multilateral cooperation in repeat prisoner's dilemmas and in coordination games.

The n-state repeat prisoner's dilemma should be sharply distinguished from the two-state version of this game. An example of the n-state game is a fishery surrounded by many states. Table 2, which was used to illustrate the two-state prisoner's dilemma, can also be used to illustrate the n-state version, except with the interpretation that the row player represents any given state, and the column player represents all the other states. Each state does better by overfishing, whether or not other states overfish; therefore, all states will overfish. One might ask whether the

state would refrain from overfishing in order to avoid retaliation by other states. The fishery could be preserved if all states adopt the strategy of, for example, overfishing for all future rounds if any single state overfishes in any previous round.[40] This draconian strategy, however, would result in the depletion of the fishery if any single state cheated, or even if a single state mistakenly believed that another state cheated. As the number of states increases, the cost of monitoring increases, and therefore the likelihood of erroneous punishment and undetected free-riding increases.

Recall also that we are talking here about the evolution of a CIL norm, so the states would all have to adopt this strategy, rather than any of the indefinitely large number of alternatives, in order for cooperation to succeed. Probably for these reasons, we do not observe such draconian strategies in the real world. Although game theory does not rule out the possibility of n-state cooperation, the assumptions required for such an outcome are quite strong and usually unrealistic. For this reason, we doubt the utility of n-player prisoner's dilemmas as an explanation for multilateral or "universal" behavioral regularities.[41]

Similar comments apply to n-state coordination games. Examples of n-state coordination problems include the division of the world into time zones and the choice of international communication or transportation standards. In the latter case, every state wants to facilitate transportation between territories, but all states must agree on, for example, a railroad gauge. Once a particular standard is established, no state gains anything from deviating from it. If everyone uses the same gauge, a state will likely lose by switching to another gauge because it will increase the cost of interstate transportation.

To say that states face multilateral coordination problems is not, however, to say that these problems have been, or can be, solved in a decentralized way. Decentralized problem-solving is very difficult because the costs of coordination rise exponentially with the number of states. Imagine ten contiguous states that must choose between different railroad gauges. If there are only two possible gauges, and each state chooses a gauge independently, the odds that they will all choose the same gauge in the first round are 1 in 2^{10}, or 1 in 1024. In later rounds, one state might, at great cost, switch to the gauge used by another state,

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[40] See Michihiro Kandori, *Social Norms and Community Enforcement*, 59 Rev Econ Stud 63 (1992), on n-player prisoner's dilemmas.

[41] This skepticism is shared by others. See, for example, Oye, *Explaining Cooperation under Anarchy* at 6-7 (cited in note 32).

but at the same time one or more other states might switch to the gauge of the first state. And if there are more than two gauges—if there are dozens or hundreds of possibilities from which to choose —the odds against coordination are astronomical. Over a very long period of time, it is conceivable that the states might eventually settle on the same gauge, especially if some gauges are economically superior.[42] But this is unlikely.

One can imagine another exception to the general proposition that multinational coordination games are not likely to be solved in a decentralized fashion. Suppose that two states that are technological leaders play a coordination game that establishes a particular gauge. A third state that later develops the technology might independently adopt this standard in order to minimize the cost of transportation to the first two states. Other states then imitate the first three states. Here, the original bilateral coordination game can establish the focal point to multilateral coordination.[43] While this result is possible, it is clearly difficult to achieve, and we have found no example of it in CIL.

For the reasons discussed above, n-state prisoner's dilemmas and coordination games tend to be solved, if at all, by treaty or other international agreement, and not by decentralized evolution. We discuss this point further below.[44] For now, it is sufficient to understand that our hypothesis is that CIL norms that have apparent universal scope are in fact the result of coincidence of interest, coercion, or the pairwise interactions discussed above.

6. Comparison of the basic model and the traditional view.

The traditional perspective would not view a behavioral regularity that arises from any of the four strategic situations outlined above as an example of CIL. To see why, begin with coincidence of interest. In this situation, parties acting independently achieve their best outcomes regardless of the behavior of the other party. In this strategic scenario, the behavioral regularity of nations not sinking enemy ships is functionally identical to the behavioral regularity of nations not sinking their own

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[42] The model for such an argument would come from evolutionary game theory. See, for example, H. Peyton Young, *Individual Strategy and Social Structure: An Evolutionary Theory of Institutions* 25-90 (Princeton 1998). This model shows that as long as parties either experiment or occasionally make errors, and as long as they interact frequently, parties will eventually coordinate on Pareto-optimal actions. "Eventually," however, may be a very long time, and the games the model uses rely on institutional structure that is lacking with respect to CIL.

[43] We are indebted to Robert Keohane for this point.

[44] See Section IV.B.

ships. There are an infinite number of behavioral regularities of this form that no one would claim constitutes law or custom. None of these behaviors has anything to do with a nation's "sense of legal obligation," which is so central to the traditional account.

Similarly, behavioral regularities explained by coercion would not be viewed as CIL from the traditional perspective. The behavioral regularity results from the dominion of the powerful over the weak. Weak states do not act in the strong state's interest out of a sense of legal obligation. They do so in order to avoid retaliation.

Now consider a behavioral regularity that results from bilateral prisoner's dilemmas. This behavior seems more meaningful than in the other two situations. This is because in any particular iteration of the game, each nation has a private incentive to cheat. When a nation cooperates in a round, it appears to be complying with a norm because it acts in a fashion not in its immediate self-interest. For these reasons, the bilateral iterated prisoner's dilemma approaches the traditional conception of CIL more than the other two strategic forms.

But this explanation for an international behavioral regularity differs from the traditional account in important respects. A nation's "compliance" with the cooperative strategy in the bilateral prisoner's dilemma has nothing to do with following a norm from a sense of legal obligation. Nations do not act in accordance with a norm that they feel obliged to follow; they act because it is in their interest to do so. The norm does not cause the nations' behavior; it reflects their behavior. As a result, behavior in bilateral iterated prisoner's dilemmas will change with variations in the underlying payoffs. Cooperation will rise or fall or break down with changes in technology and environment. Although most traditional scholars acknowledge that states are more likely to violate norms of CIL as the payoff from doing so changes, they insist that the sense of legal obligation puts some drag on such deviations. We, by contrast, insist that the payoffs from cooperation or deviation are the sole determinants of whether states engage in the behavioral regularities that are labeled norms of CIL. This is why we deny the claim that CIL is an exogenous influence on states' behavior. More significantly, the bilateral prisoner's dilemma cannot in any event be generalized to the situation of multilateral cooperation, which is such an important part of the traditional account.

Finally, pairwise coordination may emerge spontaneously, or "evolve" into a behavioral regularity, but the resulting norm is not universal. Multilateral coordination is, for reasons explained

above, highly unlikely to evolve, but if it were to evolve, states would not act as they do out of a sense of legal obligation, but rather in order to further their interests.

B. The Origin and Change of CIL Norms

The basic model provides an account of the behaviors associated with CIL. We now show how each of the strategic positions explains the origin and change of these behaviors. The examples below are illustrative but not exhaustive. Our purpose is to show that, under our theory, the way CIL originates and changes is no mystery.

First, when CIL is used to refer to states whose interests coincide, a change in CIL will occur whenever the states' interests change, and the states' interests will change when the environment changes. For example, states i and j seize each other's fishing vessels at time 0, perhaps because they gain more by engaging in mutual predation than by engaging in unilateral or mutual restraint. At time 1, state k enters the scene and threatens the security of both state i and state j. Now, states i and j have a better use for their navies: defense against state k's navy rather than seizure of fishing vessels. If one defines a CIL norm as any behavioral regularity, then the CIL norm changes (from mutual predation at time 0 to mutual restraint at time 1). If one defines a CIL norm only as behavioral regularities that are "beneficial" in some sense, then the CIL norm arises at time 1 from the disorder that existed at time 0.

Second, when CIL is used to refer to the behavioral regularity that results when one state coerces the other, a change in CIL will again occur whenever the states' interests or relative power change. State i loses its war with state k and also its power to coerce state j, so state j starts seizing i's fishing boats. The old CIL against the seizure of fishing vessels is either replaced by a new norm or by nothing, or disorder gives way to a new norm, again depending on how one defines CIL.

Third, when CIL is used to refer to the behavioral regularity in a bilateral repeated prisoner's dilemma, a more complicated story is needed. One possibility is that CIL norms of this form can arise when "neutral" behavioral regularities already exist because of coincidence of interest, but payoffs change, creating a conflict of interest. To illustrate, suppose that at time 0 two states fail to seize each other's fishing boats just because their navies have more valuable opportunities. At time 1 these opportunities disappear (for example, a naval war with other states ends), and consequently the one-round payoff from seizing fishing

boats becomes higher than the payoff from not doing so. Each country must now decide whether to begin seizing the other's fishing boats.

At this point, the status quo—not seizing fishing boats—is focal, in the sense that each state recognizes it as a possible desirable state of affairs and this recognition is common knowledge (i.e., state j knows that state i recognizes the status quo as a desirable state of affairs, and state i knows that state j knows this). One state might rationally hold off seizing the other state's boats in the hope that the other state recognizes that this is a mutually desirable strategy. Or, one state might not realize that payoffs have changed, and the other state declines to alert the first state to that fact by seizing its fishing boats, given that the other state prefers to preserve the status quo. In either case, one might say that a "mere" behavioral regularity based on coincidence of interest gives way to a norm in which the behavioral regularity reflects cooperation. In contrast, if the status quo is that of mutual seizure of fishing boats, it will be much more difficult for a pattern of not seizing boats to arise, given that each state knows that if it stops unilaterally, the other state will be tempted to continue seizing boats.

It is not the case, however, that a "neutral" behavioral regularity is a necessary predecessor to bilateral cooperation. Any focal point can stimulate the emergence of a behavioral regularity that produces cooperative gains. Suppose that state i and state j face the payoffs described by Table 2 above—a prisoner's dilemma—because of an exogenous change. Prior to this change, each state seized the fishing boats of the other. The change could be, for example, wars involving other countries, which require the attention of each state's navies. Each state still prefers seizing fishing boats to ignoring them in a single round, but both would be better off over the long term if both refrained from seizing the boats. There is no time for a treaty. State i might simply announce, "we will no longer seize the fishing boats from state j, unless state j seizes our fishing boats." If state j knows state i's payoffs, it might very well believe state i. The joint action of ignoring unless provoked is focal because of the announcement, which is credible because each state knows that this strategy leads to the optimal outcome. Thus, a CIL norm can arise despite the absence of a long historical practice.

Fourth, when CIL norms arise from behavior in coordination games, they can arise and change as a result of trial and error. Recall the example of a coordination game in which armies patrol an area of disputed land that is divided about evenly by a river

and a road, and the river and the road cross at various points. (See Table 3.) Suppose the soldiers want to avoid conflict, and they know that conflict will arise if they patrol overlapping areas. Both sides do best if they patrol up to the same boundary (either river or road); they come into conflict if they patrol up to a different boundary. If the river is a superior boundary, say, because it keeps opposing soldiers farther apart, then the payoffs from the river boundary would be higher and patrolling along the river is a natural focal point. But even if both states do not choose this strategy, so long as payoffs for identical actions are equal one would expect eventual coordination on the same action, albeit perhaps after an initial period of conflict.[45] And once the pattern is established, no state has an incentive to deviate. We present this example, however, as a theoretical possibility; we do not think it explains behaviors traditionally associated with CIL.

C. Casuistry and Reputation

Some scholars believe that states comply with CIL because CIL violations injure a state's reputation. However, it is hard to see why reputation would play an important role in explaining compliance with CIL norms beyond the limited sense in which it describes tit-for-tat and related strategies in the repeat bilateral prisoner's dilemma. The officials who direct a state's foreign policy must worry about their state's reputation among foreign states, but at the same time they respond to domestic pressures to violate international law that injures domestic interests.[46] Moreover, as Keohane has observed, a reputation for compliance with international law is not necessarily the best means—and certainly not the only means—for accomplishing foreign policy objectives.[47] States can benefit from reputations for toughness or even for irrationality or unpredictability. Powerful states, like the United States, cannot be punished when they violate international law, so they may do better by violating international law when doing so shows that they will retaliate against threats to national security (for example, Clinton's arguably illegal bombing of Sudan). Weak states with idiosyncratic domestic arrangements—like Iraq, Serbia, or North Korea—may benefit by being unpredictable or irrational. As Schelling has famously shown, one

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[45] See Young, *Individual Strategy and Social Structure* at 25-90 (cited in note 42).

[46] See Robert D. Putnam, *Diplomacy and domestic politics: the logic of two-level games*, 42 Intl Org 427 (1988).

[47] See Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 Harv Intl L J 487, 496-99 (1997).

cannot coerce a person by threatening him if that person is irrational.[48] One might conclude that all things equal, nations will strive to have a reputation for compliance with international law, but a reputation for compliance will not always be of paramount concern because all things are not equal.

It is true, however, that states seem to care about their reputations under certain circumstances. States make promises, commitments, and pronouncements of intention to abide by CIL and then try not to violate them in obvious ways. When they do violate them, they do not admit to their violations, but rather justify their actions by reinterpreting their statements. Why do states engage in such casuistry rather than admit the breach of their commitments or remain silent?

A complete answer to this question would take us far afield, but we sketch such an answer, because the phenomenon of state casuistry might be taken as an objection to our thesis that scholars exaggerate the influence of CIL norms on international behavior. We consider two models.

1. The rogue state model.

As is well known, a person who can commit himself to keeping promises has more power than a person who cannot.[49] The first person can find partners in valuable joint endeavors; the second person cannot. The same is true for states. A state can benefit from international cooperation only if other states believe that it will usually keep its promises. States try to keep their promises in order to persuade other states that they are reliable.

To see how this works, imagine a game in which state i makes a promise, state j relies on the promise or declines to rely on it, state i decides whether to breach the promise, and then the game starts over.[50] State i wants state j to rely on the promise, but state j will rely only if state i has a reputation for keeping promises—that is, state i is civilized rather than a rogue state. At any given round t, state j might rely on promises made by any state that has kept all (or a major part of) its promises in the past; likewise, state j will not rely on promises made by a state

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[48] See Thomas C. Schelling, *The Strategy of Conflict* 6 (Harvard 1963).

[49] See id at 43-44.

[50] This game is known in the literature as a "cheap talk" game because the cost of making a promise is assumed to be zero. The crucial features of the model are that the recipient of the promise does not have perfect information about the promisor's discount factor and that the promisor's and recipient's interests are not too divergent. See, for example, David Austen-Smith, *Strategic Models of Talk in Political Decision Making*, 13 Intl Pol Sci Rev 45 (1992).

that has breached many of its past promises. Thus, when state i decides whether to breach a promise, it must take account both of the immediate payoff from breach, and of the long-term decline in its reputation from the breach. There are a variety of equilibria, including the typical "babbling" equilibrium in which no one believes or bothers to make promises.[51] One plausible equilibrium is one in which state i keeps promises even if the promises are against its immediate interest; as a result, state j believes that state i is civilized. This result does not mean that states always keep promises; rather, it means only that states will keep their promises as long as the reputational gains exceed the short-term benefits from breach.

Whether an action is a breach of a promise is not always clear. When ambiguity exists, a state will always claim that it kept a promise rather than admit to a breach. A state's insistence that an action is consistent with a promise is an argument that the state keeps its promises. In general, a state would not keep silent or admit that it was breaking a promise—by so doing, it would reveal that it did not keep promises. By insisting that it kept its promise, a state leaves open the possibility that other states will believe that it did; thus they will not revise their beliefs about whether the state is civilized or rogue.

The existence of casuistry, then, does not presuppose that states are constrained by CIL. It presupposes only that some states are more likely to be civilized than other states, and most states would rather be classified in the first group. States pay lip service to CIL in order to avoid the inference that they are rogue states.

2. The coordination model.

Another reason why states keep their promises and try to act consistently is that they receive payoffs when other states successfully rely on their actions. Recall the two-state repeat prisoner's dilemma model of the fishing vessel exemption.[52] Each state refrains from seizing the fishing vessels of the other state, in the expectation that the other state will do the same. As we noted above,[53] this game involves a problem of coordination: what counts as a "seizure" of a fishing vessel. The conventional wisdom is that an illegal seizure occurs when the seized ship is small, plies coastal waters, and carries live fish; it is not illegal to seize

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[51] See id at 47-51.

[52] See Section II.B.

[53] See Section II.A.4.

a large commercial ship that engages in deep-water fishing and carries salted fish.

Suppose that state i's navy seizes a vessel that falls between these categories—a large vessel that plies coastal waters. Perhaps this form of fishing is new, made possible by technological innovations. To avoid retaliation against its own small fishing vessels, state i might say that it has complied with CIL, arguing that seizure of the large boat does not count as a "defection" in the repeat prisoner's dilemma. On this interpretation, the reference to a "norm of CIL" is an economical way of saying that one has not cheated. The statement is not irrational; indeed, it may have communicative value. If state j wants to maintain the cooperative outcome in the prisoner's dilemma, it may rationally refrain from punishing i, either because it agrees that in the optimal outcome both states can seize large coastal ships, or because it believes that i simply made a mistake. In the latter case, states i and j might argue about what should count as cooperation and what should count as cheating, and eventually settle on a compromise.

Both the rogue state and coordination models are incomplete. But they capture important elements of reality, and show why the existence of casuistry and argument among states over CIL does not mean that CIL has independent normative force. Even if CIL norms are the outcomes of prisoner's dilemmas and coordination games, it makes sense for states to claim they comply with CIL, not to admit violating CIL, and to argue about what CIL means. A CIL norm represents states' expectations based on past behavior; arguments about CIL norms, therefore, are arguments about whether expectations have been met or violated.

D. Summary

Our theory contemplates that behavioral regularities will arise at an international level, but it suggests that these regularities will lack the robustness posited by the traditional account.[54]

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[54] Although we believe that similar game theory principles might explain the emergence of customs among individuals, see Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J Legal Stud 765 (1998), our theory of CIL does not commit us to any particular view about how customs govern individual behavior. In fact, customs among nations appear to be less common and more fragile than customs among individuals. This difference is probably explained by the many differences between the factors that influence individual behavior and those that influence international behavior. For example, individual action takes place in an environment of dense and overlapping institutions, including families, governments, churches, and workplaces, all of which sanction those who deviate from norms, habituate people to behavior consistent with norms, and have roots that plunge deep into history and (in the case of the family) biology. Al-

We identify four main strategic situations in which behavioral regularities are likely to emerge: coincidence of interest, coercion, bilateral repeat prisoner's dilemma, and bilateral coordination. Each pattern results from nations following their self-interest. Behavioral regularities that reflect these patterns might not be considered remarkable or desirable. But we claim that they—rather than the notion of universal state practices followed from a sense of legal obligation—account for the CIL identified by courts and scholars.[55] The demonstration of this claim is the burden of the next Section.

III. CASE STUDIES

In this Section, we test the theory developed in Section II in three areas: neutrality, diplomatic immunity, and maritime jurisdiction. These CIL rules are thought to be robust ones under the traditional account.[56] We argue that our theory explains the evidence more persuasively than the traditional account of CIL.

A. Free Ships, Free Goods

The CIL of neutrality governs relations between neutrals and belligerents during times of war. One important neutrality issue is the status of enemy property on neutral ships. Before 1856, many belligerents—especially Britain—seized enemy property on neutrals' ships. Conventional wisdom among courts and treatise writers holds that the principle of "free ships, free goods" (FSFG)—all property on a neutral's ship, including enemy prop-

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though international institutions exist, they are not as numerous, dense, and effective as domestic institutions. In addition, because the individual decisionmaking process differs from the national decisionmaking process (which involves bargaining and compromise among many constituencies within a political framework), arguing about one on the basis of an analysis of the other is hazardous. In short, interaction among nations and interaction among individuals are separate phenomena, which are best analyzed separately.

[55] To be more precise, we show below that banal behavioral regularities—those that arise from coincidence of interest, for example—are sometimes called CIL by scholars and sometimes not. It appears that scholars are more likely to describe such regularities as norms of CIL if the regularities appear to be different from those that prevailed at some earlier time, and "better" in an unspecified way. So, for example, no scholar would call the pattern of not sinking one's own ships a norm of CIL, but scholars would argue that a pattern of not seizing another state's fishing vessels is a norm of CIL, even though the two cases are formally identical. The difference appears to be that the implicit baseline in the second case is an undesirable (in the scholar's eye) earlier period in which states seized fishing vessels.

[56] Each of these three CIL rules is traditional in the sense that each governed *international* behaviors and flourished long before World War II. Since World War II, a new form of CIL has developed—the new CIL of human rights—that does not track international behavioral regularities. We examine this new CIL separately in Section IV.C.

erty but excluding contraband, is immune from seizure—became a well-established rule of CIL after the Declaration of Paris in 1856.[57] The Declaration followed the Crimean War (1852-56), in which France, England, Turkey, and Piedmont defeated Russia. One of the Declaration's four principles was the FSFG principle.[58] All parties to the Crimean War (including Great Britain) signed the Declaration, and during the next fifty years most of the major nations of the world acceded to it. In addition, the nations that did not accede to the Declaration consistently announced adherence to the FSFG principle at the outset of wars in which they were belligerents. The broad accession to the Declaration, consistent state pronouncements in support of FSFG, and the relative paucity of overt violations of FSFG are the bases for the claim that the FSFG principle was a rule of CIL after 1856.

In this Section we argue that the historical evidence supports our thesis that there was no CIL rule of FSFG in the sense of a universal behavioral regularity of belligerents not seizing enemy property on neutral ships. Academic and judicial claims to the contrary exemplify several errors common to analyses of CIL.

1. United States Civil War.

For its first seventy years, the United States was the world's most ardent defender of neutral rights. This stance was designed to promote trade and keep the United States out of European entanglements. It included a firm commitment to FSFG, a strict conception of blockade, and a narrowly defined conception of contraband.[59] The United States did not sign the pro-neutral Declaration of Paris because, as a relatively weak naval power, it ob-

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[57] For statements of the conventional wisdom among treatise writers, see, for example, C. John Colombos, *A Treatise on the Law of Prize* § 6 at 7, §§ 151-54 at 164-67 (Sweet & Maxwell 1926); Phillip Jessup, *American Neutrality and International Police* 20-23 (World Peace Foundation 1928); John Bassett Moore, 7 *A Digest of International Law* § 1179 at 382 (GPO 1906); Hannis Taylor, *A Treatise on International Public Law* § 651 at 721-23 (Callaghan 1901); Theodore Dwight Woolsey, *Introduction to the Study of International Law* § 186 at 302-03 (Charles Scribner's Sons 6th ed 1901). Compare William Edward Hall, *A Treatise on International Law* 692 (Clarendon 5th ed 1904) (although "the freedom of enemy's goods in neutral vessels is not yet secured by a unanimous act, or by a usage which is in strictness binding on all nations, there is little probability of reversion to the custom which was at one time universal, and which until lately enjoyed a superior authority"). For judicial statements, see, for example, *The Marie Glaeser*, 1 Brit & Col Prize Cases 38, 53-54 (1914) (dicta examining the widespread acceptance of the Declaration of Paris).

[58] See D.H.N. Johnson, *Prize Law*, in 4 *Encyclopedia of Public International Law* 154, 155-56 (North-Holland 1982) ("The neutral flag covers enemy's goods, with the exception of contraband.").

[59] See Carlton Savage, 1 *Policy of the United States Toward Maritime Commerce in War* 1-82 (GPO 1934).

jected to the Declaration's provision outlawing privateering.[60] But in light of its historic support for FSFG, it was no surprise that, when its Civil War began five years after the Declaration, the United States announced adherence to the principle that "[f]ree ships make free goods . . . with the exception of articles contraband of war."[61]

The United States' novel status as a dominant naval belligerent provided the first real test of its commitment to neutrality principles. It failed the test. In the "single incident in which the question of free ships, free goods arose during the Civil War," a United States Prize court apparently rejected the FSFG principle.[62] More insidious to the FSFG principle than this overt violation was the United States' use of an unprecedentedly broad conception of blockade and contraband to justify widespread disruption of neutral ships carrying enemy goods.

At the outset of the Civil War, Lincoln declared a blockade of the entire coastline of the Confederate states. A blockade justified a belligerent in seizing all ships—including neutral ships—attempting to violate the blockade. The traditional United States position was that blockades were legitimate only if they were "effective" in the sense of preventing access to the enemy's coast.[63] Anything short of this strict definition of effective blockade would allow a belligerent to declare a paper blockade and "assert a general right to capture any ship bound to his enemy," thereby undermining FSFG and other neutral rights.[64] American insistence on the principle of effective blockades was one reason for the War of 1812.[65]

When Lincoln declared the blockade of the Confederacy, one Union ship covered each sixty-six miles of Confederate coast, and nine out of ten vessels successfully breached the blockade; during the war five of six blockade runners made it through.[66] This po-

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[60] See President Franklin Pierce, *Fourth Annual Message* (Dec 2, 1856), in James D. Richardson, 5 *A Compilation of the Messages and Papers of the Presidents 1789-1897* 397, 412-14 (Cong 1897).

[61] See William H. Seward, *Correspondence Circular* (Apr 24, 1861), in *Papers Relating to Foreign Affairs, Accompanying the Annual Message of the President to the Second Session of the Thirty-Seventh Congress* 34 (Kraus Reprint 1965).

[62] Stuart L. Bernath, *Squall Across the Atlantic: American Civil War Prize Cases and Diplomacy* 7 (California 1970).

[63] See Moore, 7 *International Law* § 1269 at 788-97 (cited in note 57); Savage, 1 *Maritime Commerce in War* at 25, 38-39, 45 (cited in note 59).

[64] Jessup, *American Neutrality* at 24 (cited in note 57).

[65] Id at 25.

[66] Frank L. Owlsey, *America and the Freedom of the Seas, 1861-1865*, in Avery Craven, ed, *Essays in Honor of William E. Dodd* 194, 194-201 (Chicago 1935). See also Bernath, *Squall Across the Atlantic* at 11 (cited in note 62).

rous blockade would have been deemed ineffective under prior U.S. views about CIL.[67] But Lincoln changed the United States' stance, arguing that a blockade did not have to be totally effective to be legally effective.[68] The Supreme Court, sitting as a Prize court, later ratified Lincoln's view as consistent with CIL.[69]

The United States' practice with respect to effective blockades undermined the force of the FSFG principle, because it justified the United States in preying on neutral vessels anywhere at sea that were bound to a blockaded port. By itself, this practice did not completely undermine FSFG, for a neutral could, in theory, take enemy property to a neutral port for subsequent shipment to the Confederacy. But the United States closed this loophole too. In the early nineteenth century, it had vigorously protested the English practice of seizing American ships sailing between two neutral ports, which the English justified on the ground that the goods were on a "continuous voyage" to a blockaded port.[70] In the Civil War, the United States reversed course and began to capture neutral vessels sailing between neutral ports if the ultimate destination of the goods on board the ship was the blockaded Confederacy.[71] In so doing, the United States engaged in generous presumptions about the goods' ultimate destination that expanded the concept of "continuous voyage" beyond even England's broad interpretation. The Supreme Court, sitting as a Prize court applying CIL, upheld this broad conception too.[72]

The United States' liberal policy concerning blockade and continuous voyage undermined the FSFG principle.[73] This policy was guided by expediency, not principle. The goal was to be as

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[67] See Owsley, *America and the Freedom of the Seas* at 197-204 (cited in note 66).

[68] See John W. Coogan, *The End of Neutrality: The United States, Britain and Maritime Rights 1899-1915* 22 (Cornell 1981); Savage, 1 *Maritime Commerce in War* at 87-90 (cited in note 59). See also Bernath, *Squall Across the Atlantic* at 11-14 (cited in note 62).

[69] See, for example, *The Springbok*, 72 US (5 Wall) 1, 21-28 (1866); *The Peterhoff*, 72 US (5 Wall) 28, 50-52 (1866); Moore, 7 *International Law* § 1259 at 708-15 (cited in note 57).

[70] Bernath, *Squall Across the Atlantic* at 66-67 (cited in note 62).

[71] See James P. Baxter, 3d, *The British Government and Neutral Rights, 1861-1865*, 34 Am Hist Rev 9, 18-19 (1928); James P. Baxter, 3d, *Some British Opinions as to Neutral Rights, 1861-1865*, 23 Am J Intl L 517 (1929).

[72] See *The Springbok*, 72 US (5 Wall) at 21; *The Peterhoff*, 72 US (5 Wall) at 54; *The Bermuda*, 70 US (3 Wall) 514, 551-58 (1865); *The Circassian*, 69 US (2 Wall) 135, 151-55 (1864). See also Thomas Baty, *International Law in South Africa* 13-17 (Stevens & Haynes 1900).

[73] See W. Arnold-Forster, *The New Freedom of the Seas* 31-32 (Methuen 1942) ("By [an] irony of fate, the first country to contribute to [the] stultification of the Free Ships rule was the very State which had been the rule's most consistent champion—the United States. . . . Thus the United States began the process of stretching the rules of contraband and blockade, and thereby walking through the Free Ships rule.").

aggressive as possible in shutting down trade with the Confederacy without provoking the British to enter the War on the side of the South. In pursuing this goal, some United States officials (such as Secretary of State William Henry Seward) were indifferent to CIL or tried to manipulate its requirements for strategic purposes; other officials (such as Secretary of Navy Gideon Welles) were ignorant or disdainful of CIL.[74] There is no evidence that the FSFG rule, to which the United States announced adherence at the outset of the War, had any influence on the government's decisionmaking process, and the announcement of fidelity to FSFG was belied by the government's subsequent practice.

Following the American Civil War, other nations also expanded collateral maritime doctrines to water down the FSFG principle.[75] For example, in the Franco-Chinese conflict of 1885, the French embraced a broad doctrine of continuous voyage and contraband to seize a ship carrying rice between neutral ports.[76] Japan engaged in similar acts during the Sino-Japanese War of 1894, as did the Italians in their 1896 war with Abyssinia.[77]

2. Spanish-American War.

In the next major war, the Spanish-American War (1898), the United States and Spain engaged each other primarily through naval power. Although neither nation was at the time a signatory to the Declaration of Paris, both nations announced adherence to its principles—including FSFG—at the outset of the war.[78] During the war Spain did not disrupt neutral ships that

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[74] See Bernath, *Squall Across the Atlantic* at 12-17 (cited in note 62); Sister Mary Martinice O'Rourke, *The Diplomacy of William H. Seward During the Civil War: His Policies as Related to International Law* (unpublished PhD dissertation, UC Berkeley 1963); Owlsey, *America and the Freedom of the Seas* at 194-256 (cited in note 66).

[75] It is worth mentioning how subsequent actions by the United States are in tension with the notion that FSFG had bite as a rule of CIL. In several bilateral treaties made after the Declaration, the United States recognized that the FSFG principle is "permanent and immutable," but the contracting parties agreed to apply the principle only to the commerce and navigation of nations that "consent [to] and adopt" the permanency and immutability of "free ships, free goods." See Moore, 7 *International Law* § 1183 at 402 (cited in note 57). Similarly, several treaties after the Declaration acknowledged the FSFG principle, but only in regard to the property of enemies who recognized it. Id. The United States' assent to FSFG on various conditions of reciprocity suggests that the rule was not binding on the United States as a matter of CIL.

[76] J.H.W. Verzijl, W.P. Heere and J.P.S. Offerhaus, XI *International Law in Historical Perspective* 367 (Kluwer Academic 1992).

[77] Id at 367-69.

[78] See President William McKinley, *A Proclamation* (Apr 26, 1898), in 15 *A Compilation of the Messages and Papers of the Presidents* 6474 (Bureau of Natl Literature); *Spanish Royal Decree* (Apr 23, 1898), translated in *Papers Relating to the Foreign Relations of*

contained United States property. And despite controversial blockades of a few Spanish ports and a mildly expansive contraband list,[79] the United States enforced its belligerent rights in a very narrow fashion.[80]

One could interpret these events as support for the FSFG principle. But closer inspection reveals that neither country had an interest in disrupting neutral commerce during the short three month war. Spain's Atlantic navy consisted of a handful of "inadequately equipped, out of repair, and wretchedly manned" ships[81] that were blockaded in Santiago Harbor in Cuba before they were destroyed.[82] Spain declined to prey on neutral commerce in the war not because of international law, but rather because it lacked the naval capacity to do so. The United States had different reasons for not preying on neutral commerce during the three-month war. There were few Spanish goods on neutral ships for it to capture,[83] and the United States' overwhelming military and strategic superiority meant that it had no strategic need to prey on neutral ships.

3. Boer War.

The Anglo-Boer War (1899-1904) between Britain and the two Boer republics (Transvaal and the Orange Free State) did not portend a dispute over maritime rights. The landlocked Boer republics had no navy, no merchant ships, and no coast to attack or blockade. And the British were disinclined to attack neutral trade because they believed that the Boers did not depend on it and because the British wanted to avoid reprisals from neutrals. For

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the United States 774 (GPO 1901).

[79] See Elbert J. Benton, *International Law and Diplomacy of the Spanish-American War* 196-204 (Johns Hopkins 1908).

[80] Coogan, *The End of Neutrality* at 25-26 (cited in note 68).

[81] See Harold Sprout and Margaret Sprout, *The Rise of American Naval Power 1776-1918* 232 (Princeton 1966). See also Allan Westcott, et al, *American Sea Power Since 1775* 221 (J.B. Lippincott 1947).

[82] See Clark G. Reynolds, *Command of the Sea: The History and Strategy of Maritime Empires* 418 (William Morrow 1974); David F. Trask, *The War with Spain in 1898* 257-69 (Macmillan 1981); Westcott, et al, *American Sea Power* at 230-32 (cited in note 81). Spain's naval force in the Phillipines was destroyed less than two weeks after the war began, and thus never presented a threat to neutral commerce. See also Sprout and Sprout, *The Rise of American Naval Power* at 231 (cited in note 81) (describing the Spanish vessels in the Phillipines as "decrepit" and "ill-manned"); Trask, *The War with Spain* at 95-107 (describing the decisive United States destruction of the Spanish fleet in the Battle of Manila Bay).

[83] See Thomas Gibson Bowles, *The Declaration of Paris of 1856* 205 (Sampson Low 1900).

these reasons among others, the British announced at the War's outset that they would not search or detain any neutral ship.[84]

The British attitude toward neutrals changed following early military setbacks and reports that the Boers were receiving supplies through Lourenco Marques, the neutral port for Portugese Mozambique that was forty miles by rail from the Transvaal frontier. For several months in 1899-1900, the British Navy seized American and German ships sailing from neutral ports to Lourenco Marques. In so doing, the British government acted on the basis of military expediency, and ignored legal advice that such seizures would violate CIL and the manual of the English Admiralty.[85] The British government justified the seizures on the grounds that the ships carried contraband goods and that there was "ample ground" to believe that the ultimate destination of the goods was the Boer republics.[86] The British conception of contraband goods was extremely broad, including foodstuffs.[87] It also employed a broad conception of continuous voyage.[88]

The British expansion of the contraband and continuous voyage doctrines vitiated the FSFG principle, just as the United States' actions had done during the Civil War. In contrast to the British response to the United States practice during the Civil War, however, the British practice during the Boer War caused the United States and Germany to threaten retaliation.[89] In response, Britain defended the legality of its actions, but it eventually stopped preying on neutral commerce and compensated some of the affected German commercial interests.[90]

The resolution of the maritime rights disputes in the Boer War thus ultimately resulted in a behavioral regularity consistent with the FSFG principle. But Britain did not obey the FSFG principle out of a "sense of legal obligation." Britain began the war with no interest in preying on neutral shipping. When its strategic needs changed it reversed this policy even though doing so violated the ostensible requirements of CIL. It then retreated in the face of threats, which, if carried out, would have offset any gains from interrupting neutral trade.

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[84] See Coogan, *The End of Neutrality* at 30-31 (cited in note 68).

[85] For an excellent account, see id at 31-42.

[86] See Robert Granville Campbell, *Neutral Rights and Obligations in the Anglo-Boer War*, 26 Johns Hopkins U Stud Hist & Pol Sci 153, 230-64 (1908).

[87] See id at 80-81.

[88] See id at 83-85, 96-97.

[89] See Coogan, *The End of Neutrality* at 36-41 (cited in note 68).

[90] See Campbell, 26 Johns Hopkins U Stud Hist & Pol Sci at 111-12 (cited in note 86); Coogan, *The End of Neutrality* at 38-42 (cited in note 68).

4. Russo-Japanese War.

During the Russo-Japanese War (1904-05), Russia took an even more aggressive stance towards enemy property on neutral ships than the United States during its Civil War and Britain during the Boer War. Both Russia and Japan proclaimed adherence to the FSFG principle at the outset of the war. But Russia also claimed the right to seize and sink neutral ships carrying contraband, and its contraband list "included food, fuels, and other items of general use."[91] Pursuant to these rules, the Russian navy harassed, seized, and sometimes sank American, German, and British ships, many of which contained only foodstuffs and were not bound for a Japanese port.[92] Enemy property on neutral ships received no protection.[93]

Russian policy and actions provoked threats of retaliation from Britain and (especially) the United States.[94] The Russian foreign ministry came to believe that "Russia stood to lose far more by provoking Britain and the United States than it could possibly gain by seizing a few cargoes of food."[95] Accordingly, as Britain had done during the Boer War, Russia maintained the legality of its policies but backed away from its aggressive anti-neutral actions. Once again, the Russian action is best understood as bowing to threats of retaliation in the pursuit of short-term interests, rather than compliance out of a sense of legal obligation to a rule of CIL.

5. World War I.

The absence of a customary practice concerning the rights of maritime neutrals—which was so evident in the United States Civil War, the Boer War, and the Russo-Japanese War—was confirmed by the events of the Second Hague Peace Conference of 1907 and the London Conference of 1909-10. The Hague Conference was unable to reach agreement about the content of maritime doctrines—contraband, blockade, continuous voyage, and

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[91] Coogan, *The End of Neutrality* at 44 (cited in note 68).

[92] See F.E. Smith and N.W. Sibley, *International Law as Interpreted During the Russo-Japanese War* 7 (Boston Book 1905); Sakuye Takahashi, *International Law Applied to the Russo-Japanese War* 310-30 (Banks Law 1908).

[93] As one commentary on the Russo-Japanese War stated: "[T]he entire absence of any definition of contraband in the Declaration has left neutral commerce as exposed to the encroachment of belligerent rights as before 1856. Goods which were formerly seized in neutral vessels because they were the property of enemy subjects are now liable to seizure on the pretext that they are contraband." Smith and Sibley, *Russo-Japanese War* at 227 (cited in note 92).

[94] See Coogan, *The End of Neutrality* at 44-50 (cited in note 68).

[95] Id at 50.

the like—that belligerents had invoked to skirt the FSFG rule.[96] The Conference also split on the American proposal to immunize all private property from capture during war. When delegates from the maritime powers met at the London Conference in 1908-09, they were able to reach agreement on a substantive law of maritime rights, including concrete definitions concerning contraband, continuous voyage, and blockade. But many nations (most notably England) rejected the agreement, and no country ever ratified it.

World War I began a few years later. It is well known that the war destroyed any pretense of a law of maritime rights. Contraband lists expanded to include any item unless there was proof that it was not destined for an enemy.[97] Blockades were clearly ineffective and were extended to neutral ports.[98] Blacklists, embargoes, and mine-laying further disrupted neutral commerce.[99] In short, all property on neutral ships—and especially enemy property—was subject to seizure.[100] Scholars like to say that the belligerents violated the norms of CIL; it is more accurate to say that any behavioral regularities that emerged during prior wars did not recur during World War I, no doubt because of changes in technology, stakes, and interests.

6. Assessment.

The FSFG principle illustrates how our theory explains the behaviors associated with CIL better than the traditional concep-

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[96] See C. John Colombos, *The International Law of the Sea* § 502 at 440-41, § 941 at 766 (Longmans 5th ed 1962). The Conference did agree to establish an international prize court, but this court never got off the ground. Id § 961 at 779-80.

[97] See Jessup, *American Neutrality* at 37 (cited in note 57); Edgar Turlington, 3 *Neutrality: Its History, Economics and Law, The World War Period* 8-33 (Columbia 1936).

[98] See Jessup, *American Neutrality* at 38-42 (cited in note 57); Turlington, 3 *Neutrality* at 34-66 (cited in note 97).

[99] See Jessup, *American Neutrality* at 42-50 (cited in note 57); Turlington, 3 *Neutrality* at 36-48, 67-73, 80-86 (cited in note 97).

[100] Some prize courts stated during and just after the war that FSFG was a rule of CIL. See, for example, *The Marie Glaeser*, 1 Brit & Col Prize Cases at 53-54 (dicta). But most of these cases read FSFG so narrowly as to render it practically a nullity. For example, the principle was limited to private enemy property; a belligerent could recover public enemy property on a neutral ship. See C. John Colombos, *A Treatise on the Law of Prize* § 151 at 170 (Longmans 3d ed 1949). Similarly, FSFG did not prevent a belligerent from capturing enemy property on one of its own merchant ships, see id at 179, or from capturing enemy cargo loaded from an enemy to a neutral ship, see id at 162, or unloaded from a neutral ship, see *The Batavier II*, 2 Brit & Col Prize Cases 432, 434 (1917). In addition, Prize courts did not make captors liable for the destruction of goods on board neutral ships, Colombos, *Law of Prize* § 93 at 106 (cited in note 57). By the middle of the war, even the pretense of judicial adherence to FSFG had evaporated. See Jessup, *American Neutrality* at 44-47 (cited in note 57).

tion. The theory better explains both the behavioral patterns that are consistent with the ostensible CIL norm and the deviations from the norm. It also reveals a variety of errors of generalization typical of CIL analysis.[101]

In some of the wars during the period, belligerents and neutrals acted consistently with the FSFG rule. The best explanation for this result is not, however, adherence to an exogenous CIL norm from a sense of legal obligation. In each of the wars discussed, a belligerent's decision whether, and to what extent, to forgo capturing enemy property on neutral ships was the product of an assessment of its (usually short-term) interests. Belligerents sometimes gained little from interrupting neutral trade and

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[101] A similar analysis applies to the CIL rule recognized in the famous *The Paquete Habana*, 175 US 677 (1900). Recall that the Court there held that CIL prohibited states from capturing coastal fishing vessels operated by civilian citizens of an enemy state. In support of this conclusion, the Court cited bilateral treaties stretching back over 500 years, state pronouncements, and the writings of scholars. See id at 686-708. This evidence does not support the proposition that there was a universal practice of not seizing enemy coastal fishing vessels from a sense of legal obligation. The scattered, pre-nineteenth-century bilateral treaties that the Court cited belie the existence of a universal customary practice, and indeed the Court noted that national acts consistent with the fishing vessel exemption did not rise to a rule of CIL during this period, but rather occurred (to the extent they did) out of comity or courtesy. Id at 694. The Court did think, however, that nineteenth century state practice and the writings of jurists showed that a behavioral regularity of not seizing enemy coastal fishing vessels had "ripen[ed] into a rule of international law." Id at 686. But there are many problems with this claim. First, the Court's own analysis showed that both state practice and the opinions of jurists in the nineteenth century were mixed. See id at 696-700. Second, there were very few major wars during this period, so there were few opportunities to test the proposition that states would not seize enemy coastal fishing vessels. Third, there is little evidence that states during those wars actually respected the CIL rule. During the Crimean War, the allies violated the rule while Russia had no opportunity to violate the rule. As to the other wars of this period, the little evidence that is available does not distinguish between the conventional view and our more parsimonious coincidence of interest hypothesis. Although major states relied less and less on prize over the course of the nineteenth century, this appears to have resulted from changes in technology and tactics, see Douglas W. Allen, *Compatible Incentives and the Purchase of Military Commissions*, 27 J Legal Stud 45, 59-62 (1998), rather than from changes in international law. Indeed, jurists and courts acknowledged exceptions to the CIL rule for military necessity and deep-water or commercial fishing vessels, which strongly suggests that the rule had no force whatsoever. If states did not have military (in the first case) or economic (in the second case) reasons to seize enemy fishing vessels, then they would have devoted their navies to more valuable opportunities, so the rule would not have constrained them in any way. The decision in *The Paquete Habana* itself is consistent with the conventional view of CIL—that is why it has such prominence in case books—but it is exceptional; there is no evidence that *The Paquete Habana* precedent had any influence on the subsequent behavior of nations; and there are—as far as we have found—no other cases from this time period in which a domestic court held against its own government under similar facts. For a more detailed application of our theory to the fishing exemption rule at issue in *The Paquete Habana*, see Jack L. Goldsmith and Eric A. Posner, *A Theory of Customary International Law*, Chicago John M. Olin Law & Economics Working Paper No. 63, 59-70 (2d Series 1998), available online at <http://papers.ssrn.com/paper.taf?abstract_id=145972> (visited Sept 8, 1999).

thus did not try to do so. This "coincidence of interest" situation was the position of England at the outset of the Boer War and the United States throughout the Spanish-American War. Other times belligerents gained much from capturing enemy goods on neutral ships but lost more from neutral retaliation. This "coercion" situation was the position of England later in the Boer War and Russia late in its war with Japan. In those cases in which the belligerent's desire to disrupt enemy property on neutral ships was not checked by a superior threat of neutral retaliation, the ostensible FSFG rule did nothing to prevent it from doing so. This result—which can be seen as coercion as well as a coincidence of interest—was the situation in the United States Civil War.

The FSFG example illustrates many changes in the practices of nations that are consistent with our view that international behavior is a function of nations' changing interests and relative power. In contrast, the changes make no sense under the view that nations abide by CIL from a sense of legal obligation. For example, state practice and the rationalization of practice with regard to the status of enemy property on neutral ships changed in important ways from war to war. Thus, the United States asserted neutral rights liberally throughout the nineteenth century except for the one time that it was a belligerent (its Civil War), when it asserted unprecedentedly broad belligerent rights. Similarly, England asserted broad belligerent rights in the Boer War but protested when Russia asserted similar rights in the Russo-Japanese War just a few years later. Germany vehemently protested the British anti-neutral practices during the Boer War but engaged in aggressive anti-neutral acts little more than ten years later.

In addition, the FSFG example illustrates several common fallacies committed by international law scholars. The first is to infer a CIL norm from verbal commitments to a rule of CIL. We have seen that there was no behavioral regularity of not seizing enemy property on neutral ships during the period in question; belligerents invoked a variety of related maritime rights to continue preying on enemy property on neutral ships in much the same fashion as in the pre-1856 period. As one commentator observed:

> [W]hile granting that the letter of the law [of "free ships, free goods"] has been observed strictly, the conclusion that is forced upon the student of recent practice is that, through unwarranted extension of belligerent rights based upon related portions of the law of maritime warfare, the rule that private enemy property is free when transported in neutral

> ships very nearly approaches nullity, and is only preserved in some semblance of vigor by the influence of neutral opposition to the devices of belligerents for rendering it a "dead letter."[102]

By focusing on pronouncements and the relative paucity of "direct" violations of the FSFG principle, commentators have overlooked the many ways in which the practice of seizing enemy goods on neutral ships continued unabated.

A second error, an error of induction, is to view coincidence of interest situations as examples of norm-following. For example, in the Spanish-American War the United States did not want, and Spain did not have the ability, to seize enemy property on neutral ships. The nations were not motivated by a CIL norm. A third error is the belief that the behavioral regularities associated with an ostensible CIL rule possess a unitary underlying logic. The FSFG example shows that such behavioral regularities have multiple, and quite different, explanations. Nations sometimes refrained from seizing enemy property on neutral ships because they lacked any affirmative interest in doing so, and other times because they feared neutral retaliation.

A fourth error is the belief that behavioral regularities in one maritime context generalize to all maritime contexts. As the Boer and Russo-Japanese Wars demonstrate, if a powerful neutral makes a credible threat of retaliation, the belligerent might refrain from seizing neutral ships. But such belligerent acts are a function of war-specific allocations of power and other contingent factors that inform belligerent and neutral payoff structures. There is no reason to believe that payoff structures that result in this behavioral regularity in some wars will be present in all, or even most, wars.

There is a final aspect of the FSFG story worth noting. Although state practice during the period cannot support the claim that FSFG was a rule of CIL, it is nonetheless striking that every belligerent during the post-1856 period announced adherence to FSFG as a principle of international law, and every nation attempted to justify departures from this principle as consistent with international law. We sketched above how claims of adherence to international law can function as attempts either to sig-

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[102] Harold Scott Quigley, *The Immunity of Private Property from Capture at Sea*, 11 Am J Intl L 22, 26 (1917). For similar assessments, see Arnold-Forster, *The New Freedom of the Seas* at 3 (cited in note 73); Baty, *International Law in South Africa* at 12 (cited in note 72); Benton, *Spanish-American War* at 196 (cited in note 79); Colombos, *Law of Prize* at xiii (cited in note 100); H.J. Randall, *History of Contraband of War*, 24 L Q Rev 449, 464 (1908).

nal that a nation is not a rogue state or to alert partners in a coordination game that expectations have changed.[103] Belligerents want neutrals to believe that they can be trusted, so they will not admit that they break their commitments to abide by international norms. When circumstances change and states no longer believe that they can profitably abide by their earlier commitments, they announce a reinterpretation of these commitments, rather than admit that they have violated them, in order to avoid the inference that they will not honor other commitments they have made along other dimensions of interaction.

B. Ambassadorial Immunity

Commentators have long agreed that CIL requires states to protect foreign ambassadors and related personnel.[104] This requirement divides into two main components. First, the host state may not harm foreign diplomatic personnel, either through civil or criminal process or through extra-legal means. Second, the host state must protect foreign diplomatic personnel from threats posed by citizens of the host state. Although these requirements have limitations, and they have fluctuated to some extent over the years, the CIL of ambassadorial immunity—now codified in the Vienna Convention[105]—has always been considered one of the most robust rules of CIL. Diplomatic immunity from criminal jurisdiction appears to be a particularly robust norm, for diplomats do commit crimes with some regularity and immunity from criminal jurisdiction is almost always granted.[106] It is therefore a suitable test case for our theory of CIL.

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[103] See Section II.C.

[104] See, for example, Charles G. Fenwick, *International Law* 467-70 (Appleton 3d ed 1948); Montell Ogdon, *Juridical Bases of Diplomatic Immunity: A Study in the Origin, Growth and Purpose of the Law* 8-20, 105-14 (John Byrne 1936); Lassa Oppenheim, 1 *International Law* 457-60 (Longmans 2d ed 1912); Sir Ernest Satow, *A Guide to Diplomatic Practice* 174-212 (Longmans 4th ed 1957); John Westlake, 1 *International Law* 273-81 (Cambridge 2d ed 1910); Clifton E. Wilson, *Diplomatic Privileges and Immunities* 1 (Arizona 1967); Woolsey, *Introduction to the Study of International Law* at 133-38 (cited in note 57).

[105] Article 31 provides: "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State." Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, [1972] 23 UST 3227, 3240, TIAS No 7502 (1961).

[106] For example, between August 1982 and February 1988, there were 147 alleged criminal cases involving foreign diplomats in the United States, none of whom was prosecuted. See US Department of State, Study and Report Concerning the Status of Individuals with Respect to Diplomatic Immunity in the United States, Exhibit B, prepared in pursuance of the Foreign Relations Authorization Act, Fiscal Years 1988-89, Pub L No 100-204, § 137 (Mar 18, 1988). Similarly, from October 1, 1954, to September 30, 1955, there were 93 criminal cases against diplomatic personnel in England and Wales that were not pursued because of diplomatic immunity. Wilson, *Diplomatic Privileges and Im-*

Our theory holds that a nation would grant ambassadorial immunity either when it is in its private interest to do so or when it participates in bilateral repeat games in which payoffs from cooperation (as opposed to defection) are relatively high, discount rates are relatively low, and conduct is sufficiently observable. In this Section, we first explain why behavioral regularities concerning ambassadorial immunity are consistent with the theory. We then offer explanations for various deviations from the behavioral regularity of protecting ambassadors that are inexplicable (except as "violations") under the traditional account.

There are several explanations for the behavioral regularities associated with the CIL rules of diplomatic immunity. One is coincidence of interest. A host state will not harm a diplomat if the immediate payoff from protecting him is greater than the payoff from not protecting him. Whenever a host state harasses, arrests, or expels a diplomat for any reason, it suffers an immediate cost, namely a breakdown in the channels of communication with the diplomat's home state. For this reason alone, if a diplomat has not outraged the local population or engaged in espionage or other activities that threaten national security, the immediate payoff from harassing, arresting, or expelling the diplomat will likely be less than the payoff that results from maintaining the channels of communication. A behavioral regularity that exemplifies this logic would be a coincidence of interest.

This theory, however, does not fully explain states' treatment of diplomatic personnel. It often happens that the payoff from not protecting diplomats is very high. Iranians mobbed the United States embassy in 1979 in part because they believed that the United States was responsible for the Shah's regime. If the Iranian government had restrained the mob, it would have suffered a decline in its popularity among citizens. The local population can be similarly aroused when diplomatic personnel violate local criminal laws. Members of the British public were upset when an American ambassador was not prosecuted after shooting to death an intruder.[107] The American Congress has considered several bills designed to restrict immunity for certain crimes, such as drunk driving.[108] More recently, the American public was aroused when a Georgian diplomat ran over and killed an American teenager in Washington, D.C., while driving under the influence of alcohol.[109] There are many similar examples. In all of these cases,

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munities at 79 n 6 (cited in note 104).

[107] See Wilson, *Diplomatic Privileges and Immunities* at 88 (cited in note 104).

[108] See id at 37.

[109] See *Knab v Republic of Georgia*, 1998 US Dist LEXIS 8820 (D DC) (appeal filed)

governments responsive to popular agitation would receive a relatively high short-term payoff by either seizing or allowing others to seize diplomatic personnel.

This possibility suggests that the CIL of diplomatic immunity might be better modeled as an iterated prisoner's dilemma. Suppose that states i and j have the following payoffs:

Table 4

		State i	
		harass	protect
State j	harass	2, 2	10, 0
	protect	0, 10	6, 6

Assume state j protects state i's ambassador. State i receives 10 if it harasses state j's ambassador and 6 if it protects state j's ambassador. But, if state j harasses state i's ambassador, state i receives 2 if it harasses state j's ambassador and 0 if it protects state j's ambassador. State j has symmetrical payoffs. These payoffs are most obvious during times of tension. Each state benefits if its own ambassador enjoys security because the ambassador can send and receive diplomatic messages and engage in espionage. On the other hand, each state also benefits if it can successfully harass or harm the other state's ambassador, thereby preventing the ambassador from engaging in espionage, without causing a breakdown of communication with the ambassador's home state. But if both states harass the ambassador of the other, then communication breaks down and the suboptimal equilibrium results.

In these circumstances, diplomatic immunity is a bilateral prisoner's dilemma, and can be solved only if the conditions of two-state cooperation are met. They usually are. Relations between two states are almost always indefinitely long games. The benefits from diplomatic communication are high, but these benefits are always spread out over the long term. Short-term deviations may be tempting because of local or temporary political circumstances, but are unlikely to exceed the long-term benefit of communication. When a diplomat from state j commits a crime, state i has an interest in enforcing its criminal laws against the diplomat to preserve the integrity of the criminal law and prevent

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(upholding diplomat's civil immunity).

local unrest. But if i prosecutes the diplomat, it suffers more than just a breakdown in communication with j, for j has a hostage in the person of i's ambassador and may retaliate by harming i's ambassador.[110]

These adverse consequences from enforcing local criminal law against j's diplomat mean that i will receive a larger payoff from nonenforcement if j refrains in similar circumstances. Although a diplomat may impose costs on a host state by committing crimes, the host state refrains from punishing him because it wants to maintain its own diplomat in the foreign state. This cooperative strategy (immunity) has a clear all-or-nothing quality that is relatively easy to monitor; indeed, the all-or-nothing quality of states' responses are probably intended to avoid ambiguity. Each nation's response to a violation of the immunity rule (retaliate) is clear and easy to enforce.[111] And nations that successfully maintain long-term diplomatic relations are usually relatively stable states, rather than rogue or revolutionary states, consistent with the assumption that cooperation can be achieved primarily when parties have low discount rates.

At first glance, the robust ambassadorial immunity rule appears to be a counterexample to our claim that robust multinational behavioral regularities are not likely to exist.[112] In fact, it shows the opposite. It illustrates our claim that a universal behavioral regularity may develop as an amalgam of independent, bilateral repeat prisoner's dilemmas. The logic of ambassadorial immunity—the sending and receiving of diplomats, the monitoring of diplomatic activities, the breakdown in communication and retaliation that follow harm to a diplomat, and so forth—takes place within, and is fully explained by, bilateral relations. The fact that states i and j have diplomatic relations with numerous

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[110] See, for example, Wilson, *Diplomatic Privileges and Immunities* at 56 (cited in note 104) (following Brazilian mob attack on Russian diplomats, Soviets held Brazilian "ambassador under surveillance as hostage until the safe departure of Russian diplomats from Brazil was assured").

[111] A perhaps more accurate game-theoretic representation of diplomatic immunity is the Battle of the Sexes game. If state X knows that state Y will harm X's diplomat, X will want to protect Y's diplomat in order to keep communications open. If state Y knows that state X will harm Y's diplomat, Y will want to protect X's diplomat in order to keep communications open. Both of these outcomes are equilibria, but the more plausible outcome is a mixed strategy equilibrium in which each state harms foreign diplomats with some probability p, and protects them with probability 1–p. In other words, one would observe occasional but not constant violations of diplomatic immunity, depending on the relative payoffs from violation and protection. To keep our analysis consistent with our analysis in earlier sections, we ignore these complications (without, we think, sacrificing much accuracy). For a discussion of the Battle of the Sexes game, see, for example, Morrow, *Game Theory for Political Scientists* at 91-93 (cited in note 27).

[112] See Section II.A.5.

other states is irrelevant; relations with third countries do no work in explaining the diplomatic immunity rule. Far from being a multilateral norm, and far from being a manifestation of states' sense of legal obligation, ambassadorial immunity reflects equilibria that arise independently from strategic behavior in pairwise interactions among all states.

Abundant evidence supports this claim. When diplomatic immunity is denied or postponed, the diplomat's country often retaliates, but third countries do not. For example, in 1961 the Soviet Union expelled the Dutch ambassador in protest of the Dutch police's alleged mishandling of the Soviet ambassador, but no other nations retaliated.[113] Only in egregious cases do otherwise-uninvolved states retaliate against another state for violating diplomatic immunity, and even in these cases retaliation is neither universal nor significant. Consider the Iranian invasion of the American embassy. No country pulled its embassy from Iran, and the United Nations failed to impose sanctions.[114] Only the United States' closest allies—the European Community nations and Japan—imposed economic sanctions. They did so late, grudgingly, and in response to enormous pressure from the United States.[115] The sanctions they finally did impose were generally acknowledged to be ineffectual, empty gestures.[116]

We have explained how our theory accounts for a general behavioral regularity of states protecting diplomats. But contrary to the traditional account, our theory does not predict equilibrium behavior to be identical among all states. It is one thing to say, at a high level of generality, that nations respect diplomatic immunity and that immunity equilibria resemble each other. This is not surprising because the same basic strategic game is being played by states in the same basic position. States exchange ambassadors for communicative benefits, they are sometimes tempted to prosecute foreign ambassadors or to fail to protect them from harm, they risk a breakdown in communications and retaliation against their ambassador if they fail to protect foreign ambassadors, and they can hold foreign ambassadors as hostages if foreign nations harm their own ambassadors. But our theory predicts that details of behavior will vary in important respects

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[113] See Wilson, *Diplomatic Privileges and Immunities* at 68 n 145 (cited in note 104).

[114] See Linda S. Frey and Marsha L. Frey, *The History of Diplomatic Immunity* 480, 519 (Ohio State 1999).

[115] See id at 519; *How to be a good ally without putting oneself out*, Economist 77 (Apr 19, 1980); Tom Matthews, et al, *Running Out of Sanctions*, Newsweek 22 (Apr 28, 1980).

[116] See Frey and Frey, *History of Diplomatic Immunity* at 480, 518-19 (cited in note 114); *Iranian sanctions—scarcely worth bothering to bust*, Economist 47 (June 7, 1980).

when the relationships among states vary. The evidence is too sketchy to confirm or falsify these hypotheses with rigor. But it is highly suggestive.[117]

The first claim is that rogue states violate the norms of diplomatic immunity more often than civilized states do. When states have unstable political institutions, their leaders weigh short-term payoffs more heavily than leaders in other states do. As a result, they are more willing to risk retaliation in order to obtain any payoffs from violating diplomatic immunity in the present. Available empirical evidence shows that developing countries, countries in the throes of revolution, and countries controlled by unstable dictators violate diplomatic immunity more frequently than "civilized states" do.[118] The Iran hostage crisis is a prominent example, but so too are the 1967 attack on the British embassy by supporters of the Cultural Revolution in China and the 1958 Iraqi military coup that resulted in the burning of the British embassy.[119] Relatedly, a survey of U.S. Foreign Service Officers indicated that "the extent of protection in so-called 'civilized countries' was greater than in the newly emerging nations," and that in these emerging nations, "the degree of protection apparently sometimes coincided with the level of political stability and the role of the political leader."[120] There are many similar examples.[121]

The second claim is that states are more likely to violate diplomatic immunity when stakes change, so that the benefits of violating immunity (for example, quelling a popular outcry) are very high or the benefits of respecting immunity (for example, maintaining communication with a state) are low. Several observations are consistent with this claim. Perhaps the most frequent denial of diplomatic immunity occurs when the diplomat does

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[117] Notice that a violation of diplomatic immunity will not necessarily be overt. If one state credibly threatens to violate diplomatic immunity, a second state may grant a waiver in order to avoid an open breach. Consider, as a possible example, *Knab*, 1998 US Dist LEXIS 8820 (Republic of Georgia waived immunity to criminal prosecution).

[118] See Frey and Frey, *History of Diplomatic Immunity* at 503-07 (cited in note 114); Grant V. McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* 142-46 (St Martin's 1989); Wilson, *Diplomatic Privileges and Immunities* at 50-51 (cited in note 104). See also Wilson, *Diplomatic Privileges and Immunities* at 50 nn 31-32 (concerning the difference between civilized and uncivilized nations).

[119] McClanahan, *Diplomatic Immunity* at 145, 181 (cited in note 118). See also id at 144 ("The behavior of revolutionary regimes in the past thirty years has also frequently failed to meet accepted standards of international behavior with respect to diplomatic immunity."); Wilson, *Diplomatic Privileges and Immunities* at 68-70 (cited in note 104).

[120] Wilson, *Diplomatic Privileges and Immunities* at 50 (cited in note 104).

[121] See id at 51-52, 62-63, 82, 86.

something in the host state that threatens its national security.[122] To take two examples: The British seized Swedish Ambassador Count Gyllenborg in 1917 in connection with a plot to overthrow George I;[123] and in 1914 the United States arrested and seized the papers of an attaché of the German embassy who was conspiring against the neutrality of the United States.[124] When a nation's security is threatened, it receives a heightened payoff from compromising diplomatic immunity. Another example is the well-documented mistreatment of diplomats behind the iron curtain at the onset of the Cold War.[125] The communist states were closed societies that often arrested, detained, and harassed diplomats—in violation of accepted immunity principles—in order to deter their travel, inquiries, and photography within the host state.[126] Wilson refers to this trend as a "retrogression" from traditional practice.[127] The retrogression makes sense: the communist states suffered more than noncommunist states from enforcement of the traditional CIL of diplomatic immunity, because in a closed society ordinary observation is more damaging than in an open society.

The third claim is that respect for diplomatic immunities, far from being universal, is sensitive to variations in bilateral relations among states over time. The Soviet Union mistreated foreign diplomats with greater regularity than Russia before and after the Soviet Union; the United States and the Soviet Union subjected each other's diplomats to more harassment during the Cold War than at other times; and states in the Eastern block treated diplomats from the West with less respect than they treated diplomats from fellow Eastern block nations.[128] The explanation for these variations is that the diplomats of one's enemies pose a greater threat to security than the diplomats of one's friends; so, when dealing with one's enemies, the payoff from violating diplomatic immunity will often be higher than the cost. By contrast, the traditional view explains ambassadorial immu-

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[122] See id at 82 ("[R]ules of immunity from criminal jurisdiction are . . . modified when the envoy's conduct threatens the safety and security of the host state."). See generally id at 82-86.

[123] See *Diplomatic Immunity and the Criminal Law*, 68 L J 226 (1929).

[124] Wilson, *Diplomatic Privileges and Immunities* at 83 (cited in note 104). See also *United States v Coplon*, 84 F Supp 472 (S D NY 1949).

[125] See McClanahan, *Diplomatic Immunity* at 143-44 (cited in note 118); Wilson, *Diplomatic Privileges and Immunities* at 55 (cited in note 104).

[126] Wilson, *Diplomatic Privileges and Immunities* at 62-70 (cited in note 104).

[127] Id at 71.

[128] See id at 55-56, 62-70, 71-72.

nity by asserting the existence of a norm, but it cannot explain the many deviations from the norm.

C. Territorial Sea

Prior to the eighteenth century, many powerful maritime nations proclaimed control over large areas of the ocean. These nations were unable to sustain their claims, however, and by the eighteenth century the seas became viewed as free areas that no nation could appropriate.[129] One limitation on this so-called "freedom of the seas" was the power that a nation retained over the territorial sea adjacent to its coast. According to the doctrine of territorial jurisdiction, a nation had plenary jurisdiction within its territorial sea and no jurisdiction without it. Other nations could freely exploit and navigate the sea up to the boundary of a nation's territorial sea. But they could no more operate within a nation's territorial sea without the nation's permission than they could operate in a nation's territory without permission.

Jurists originally conceived the territorial sea as the water a nation defended in order to protect its territorial sovereignty.[130] Bynkershoek famously captured the idea with the statement that "[t]he power of the land properly ends where the force of arms ends."[131] In the seventeenth and eighteenth centuries the territorial sea did not have a settled breadth.[132] During this time Bynkershoek's dictum transformed into the idea that a nation's sovereignty over the sea extended as far as it could fire a cannonball from its shores. By the end of the eighteenth century, many who embraced the cannon-shot rule began to identify it with a three-mile breadth, the approximate distance that cannonballs could be projected at the time.[133]

Conventional wisdom holds that a three-mile territorial sea was a rule of CIL during most of the nineteenth and the first half of the twentieth century.[134] The basis for this conventional wis-

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[129] See Bernard G. Heinzen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 Stan L Rev 597, 598-601 (1959); Philip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 3-6 (G.A. Jennings 1927).

[130] See Jessup, *Territorial Waters* at 5 (cited in note 129).

[131] Cornelis Van Bynkershoek, *De Dominio Maris Dissertatio* 44 (Oxford 1923) (Ralph Van Deman Magoffin, trans) (translation of 1744 edition).

[132] See Brownlie, *Principles of Public International Law* at 187-88 (cited in note 5).

[133] See R.R. Churchill and A.V. Lowe, *The law of the sea* 59 (Manchester 1983).

[134] For a few of the many examples, see Thomas Baty, *The Three-Mile Limit*, 22 Am J Intl L 503 (1928); M. Charles Calvo, 1 *Le Droit International Theoretique et Pratique* 479-80 (5th ed 1896); Martin Conboy, *The Territorial Sea*, 2 Can Bar Rev 8, 18 (1924); Heinzen, 11 Stan L Rev at 629, 634 (cited in note 129); Amos S. Hershey, *The Essentials of International Public Law* 195-96 (MacMillan 1912); Charles Cheney Hyde, 1 *International*

dom is as follows. In the nineteenth and twentieth centuries, the three-mile rule was officially championed by several countries—most notably England and the United States—as a rule of CIL.[135] Many nations that attempted to assert a broader jurisdiction than three miles retracted these claims in the face of threats or protests, usually from the United States or England.[136] Sometimes nations paid damages after asserting jurisdiction beyond the three-mile range.[137] The three-mile rule also appeared in numerous international agreements.[138] And it was broadly—though not unanimously—supported by jurists.[139]

The most immediate problem with the traditional account is that as many nations rejected the three-mile rule as adhered to it.[140] The Scandinavian countries always asserted at least a four-

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Law, Chiefly as Interpreted and Applied by the United States § 141 at 251-53 (Little, Brown 1922); Jessup, *Territorial Waters* at 62-66 (cited in note 129); Oppenheim, 1 *International Law* at 257 (cited in note 104); Charles Pergler, *Judicial Interpretation of International Law in the United States* 105-07 (MacMillan 1928); Sir Robert Phillimore, 1 *Commentaries Upon International Law* 274-75 (Butterworths 3d ed 1879); Westlake, 1 *International Law* at 167 (cited in note 104). For further examples, see Stefan A. Riesenfeld, *Protection of Coastal Fisheries Under International Law* 29-98 (1942).

[135] See Colombos, *The International Law of the Sea* §§ 105-07 at 85-88 (cited in note 96); Heinzen, 11 Stan L Rev at 617-19 (cited in note 129); Jessup, *Territorial Waters* at 62-63 (cited in note 129).

[136] For examples, see Heinzen, 11 Stan L Rev at 630-32 (cited in note 129).

[137] For examples, see id at 636.

[138] Most prominently, the Great Britain–United States Fishing Treaty, Convention between the United States of America and His Britannic Majesty, Respecting Fisheries, Boundary, and Restoration of Slaves, 18 Stat 297, 298, Treaty Ser No 112(2) (1818); the North Sea Fisheries Convention, Convention between Great Britain, Austria-Hungary, France, Germany, Italy, the Netherlands, Russia, Spain, and Turkey, Respecting the Free Navigation of the Suez Maritime Canal (Oct 29, 1882), in Sir Edward Hertslet and Edward Cecil Hertslet, eds, 79 *British and Foreign State Papers* 18, 20 (Harrison & Sons); and the Suez Canal Convention, Convention between Great Britain, Belgium, Denmark, France, Germany, and the Netherlands, for regulating the Police of the North Sea Fisheries (May 6, 1888), in Sir Edward Cecil Hertselt, ed, 73 *British and Foreign State Papers* 39, 41 (William Ridgeway 1889).

[139] For a summary of the views of jurists on this point during the period 1800-1942, see Riesenfeld, *Protection of Coastal Fisheries* at 29-98 (cited in note 134). Prominent skeptics of the ostensible CIL three-mile rule (who wrote in English) include James Brierly, *The Law of Nations* 102-09 (Clarendon 1928); William Edward Hall, *International Law* 126-29 (Clarendon 1880); and Riesenfeld, *Protection of Coastal Fisheries* at 135-71. For general discussions, see also Thomas Wemyss Fulton, *The Sovereignty of the Sea* (Blackwood 1911); Christopher B.V. Meyer, *The Extent of Jurisdiction in Coastal Waters* (Sijthoff 1937).

[140] See Riesenfeld, *Protection of Coastal Fisheries* at 129-250 (cited in note 134). Riesenfeld summarized his comprehensive 1942 examination of state practice by concluding:

> [T]here are many states, like Belgium, Brazil, Chile, Denmark, Ecuador, Egypt, Estonia, Germany, Great Britain and the Dominions, Iceland, Japan, Latvia, the Netherlands, Poland, the United States and Venezuela, which generally speaking adhere to the three-mile rule. On the other hand, there are likewise many other nations which do not adhere at all to this principle, or do so only to a very limited extent,

mile territorial sea;[141] Spain and Portugal consistently asserted that the territorial jurisdiction band was six miles wide;[142] Russia (and later the U.S.S.R.) frequently asserted claims beyond the three-mile band;[143] and various other less significant countries claimed jurisdiction beyond the three-mile band.[144] It is true that some of these nations sometimes asserted jurisdiction only up to three miles in the face of threats of retaliation, usually from England or the United States. To take one of many examples, in 1821 Russia claimed jurisdiction up to "100 Italian miles" off the coasts of Eastern Siberia and Alaska, but ultimately agreed to a three-mile rule by treaty with England and the United States following protests from both countries.[145] In these latter cases, the resulting behavioral regularity is best explained by coercion rather than by a CIL norm. It is no coincidence that the most successful enforcers of the three-mile rule were Britain, the preeminent naval power, and the United States, a burgeoning naval power—both states with a strong interest in limiting encroachment on the freedom of the seas, and the power to enforce these interests. However, even these powerful states were often unable to make credible threats to enforce the rule; threats, and especially complaints, were often not heeded, and practice inconsistent with the three-mile rule frequently went unabated.[146]

The absence of a customary state practice is confirmed by the debates and resolutions in various official conferences throughout the period, which reveal stark disagreement about the breadth of

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such as Argentina, Columbia, Cuba, Finland, France, Greece, Honduras, Italy, Mexico, Norway, Peru, Portugal, Rumania, Russia, Spain, Sweden, Turkey, Uruguay, and Yugoslavia.

Id at 280. Jessup's 1927 survey reached broadly similar conclusions about state practice, but nonetheless maintained that a core three-mile CIL rule existed. Jessup, *Territorial Waters* at 9-66 (cited in note 129).

[141] See Heinzen, 11 Stan L Rev at 605-12 (cited in note 129); Riesenfeld, *Protection of Coastal Fisheries* at 188-94 (cited in note 134).

[142] See Jessup, *Territorial Waters* at 41-43 (cited in note 129); Riesenfeld, *Protection of Coastal Fisheries* at 175-80 (cited in note 134).

[143] See Jessup, *Territorial Waters* at 26-31 (cited in note 129); Riesenfeld, *Protection of Coastal Fisheries* at 194-203 (cited in note 134).

[144] See Riesenfeld, *Protection of Coastal Fisheries* at 280 (cited in note 134).

[145] Id at 144-46. For other examples, see Heinzen, 11 Stan L Rev at 630 (cited in note 129).

[146] Thus, for example, Spain ignored some British complaints in the nineteenth century about Spanish jurisdictional claims and seizures beyond the three-mile limit. See Riesenfeld, *Protection of Coastal Fisheries* at 146-47 (cited in note 134). "In 1874 Great Britain tried . . . to bring about an international *demarche* of the maritime powers in favor of the three-mile rule and against the Spanish claims; but most of the other powers either did not want to commit themselves, or disagreed with the British point of view." Id at 147.

the territorial sea.[147] In addition, the treatise writers were deeply split.[148] Those who claimed that CIL required a three-mile band were predominantly English-speaking jurists who reflected their nations' views of CIL.[149]

Turning to the details of state practice, throughout the period many nations enforced antismuggling and related security laws outside the three-mile band.[150] The standard view explains these examples away as "exceptions" to the three-mile rule or as actions that other nations did not challenge for reasons of "comity."[151] A better explanation is that the coastal nation has a strong interest in asserting jurisdiction beyond three miles in this context, and other nations usually have little reason to encourage smuggling into the coastal nation. This is not to suggest that all anti-smuggling regimes arose from such a coincidence of interest. Sometimes the assertion of anti-smuggling jurisdiction beyond the three-mile limit resulted in protests, although these protests did not always, or even usually, result in a retreat to the three-mile line.[152] Even a relatively weak state is in a good position to patrol coastal waters; so a large state that seeks to preserve the three-mile line may be too weak to enforce its will when many weak states violate the rule by claiming a broader territorial sea.

A related problem was the scope of the band of territorial sea in which a neutral nation's ships could remain immune from bel-

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[147] For example, widespread disagreement about the scope of the territorial sea precipitated the North Sea Fisheries Convention of 1882. See id at 149-50; Fulton, *The Sovereignty of the Sea* at 630-32 (cited in note 139). Although the parties to the Convention eventually agreed by treaty to a three-mile rule for fishing, the conference leading to the Convention was marked by disagreement about territorial sea requirements under CIL. Similarly, at the 1930 Hague Conference for the Progressive Codification of CIL, twenty states sought a three-mile territorial sea, four states sought a four-mile territorial sea, and twelve states sought a six-mile territorial sea, and many states sought rights over contiguous zones beyond three miles. See Churchill and Lowe, *The law of the sea* at 102-03 (cited in note 133). Both the first and second United Nations Law of the Sea Conferences—in 1958 and 1960—tried and failed to agree upon a limit for the territorial sea. See id; Heinzen, 11 Stan L Rev at 641-51 (cited in note 129). On the inability of various private groups devoted to codification to agree on a territorial sea limit during this period, see Riesenfeld, *Protection of Coastal Fisheries* at 99-111 (cited in note 134).

[148] See Riesenfeld, *Protection of Coastal Fisheries* at 279-80 (cited in note 134).

[149] See Fulton, *The Sovereignty of the Sea* at 681 (cited in note 139).

[150] See *Manchester v Massachusetts*, 139 US 240, 258 (1891) ("[A]ll governments, . . . for the prevention of frauds on its revenue, exercise an authority beyond [the three-mile] limit."). See generally Fulton, *The Sovereignty of the Sea* at 594 (cited in note 139) (surveying this practice); Jessup, *Territorial Waters* at 19, 25, 76-96 (cited in note 129) (same).

[151] This is the strategy of Jessup. See Jessup, *Territorial Waters* at 76-96 (cited in note 129).

[152] For example, England complained about the 1853 Spanish seizure of the British ship Fortuna, but Spain ignored the complaint, and England dropped the matter after failing to rally support from other nations for its position. See Riesenfeld, *Protection of Coastal Fisheries* at 146-47 (cited in note 134).

ligerent capture. During the period in question, some nations asserted a three-mile zone of neutrality, but many other nations asserted zones of neutrality beyond three miles.[153] These regulations were rarely tested because there were relatively few maritime wars in the seventy years prior to World War I.[154] But the few international clashes in this context are revealing. During World War I Britain successfully checked Norway's assertion of a four-mile neutrality zone by capturing Norwegian ships three miles outside of Norway; but, at the same time, England (and the United States) acquiesced in Italy's assertion of a six-mile neutrality zone "out of courtesy."[155] Scholars have reconciled these actions by arguing that the Norwegian situation exemplifies the true CIL rule and that the Italian deviation was permitted out of comity. A better explanation is that England had the power to coerce compliance with the three-mile rule and a significant interest in intercepting Norwegian shipping destined for Germany. But it did not enforce the three-mile rule against its ally Italy. The relationship between England and Norway was one of coercion; the relationship between England and Italy was one of coincidence of interest.

The deviations from the ostensible three-mile rule exemplify the larger principle that a nation could assert jurisdiction beyond the three-mile limit in self-defense or for self-preservation.[156] This "exception" to the three-mile rule—analogous to the military necessity exception in the prize cases or the national security exception to ambassadorial immunity—suggests that the three-mile rule did not limit national action in cases where nations had interests in exceeding the limit. A similar story explains the practice of asserting jurisdiction beyond three miles over the rare, valuable, and exhaustible sedentary fisheries such as coral and oysters.[157] The same idea inheres in the single exception to exclusive jurisdiction *within* the three-mile zone—the CIL right of innocent passage.[158] The right of innocent passage permits a foreign ship to pass through the territorial sea unless the ship does something to prejudice the security, public policy, or fiscal interests of the state.[159] There is indeed a long-term behavioral regu-

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[153] For a few of many examples, see Jessup, *Territorial Waters* at 25, 47-48, 103-05 (cited in note 129).

[154] See Fulton, *The Sovereignty of the Sea* at 604, 651 (cited in note 139).

[155] See Jessup, *Territorial Waters* at 25 n 86, 34 (cited in note 129); Riesenfeld, *Protection of Coastal Fisheries* at 163 (cited in note 134).

[156] See Jessup, *Territorial Waters* at 96-101 (cited in note 129).

[157] See id at 13-16.

[158] See id at 120.

[159] See id at 120-23.

larity of nations not seizing foreign ships passing close to shore that are deemed innocent. But nations have varying and self-serving definitions of innocence; the "rule" does nothing to prevent a nation from seizing a ship that the nation perceives to be a threat to its interest. What international scholars consider to be CIL is nothing more than a description of states acting in their national interest: states seize ships passing through their territorial sea exactly when they have reason to do so.[160] All of these examples are inconsistent with the traditional account of the three-mile rule; all have straightforward explanations within our framework.

Another embarrassment to the traditional account that makes sense within our theory concerns the double standards of the three-mile rule's proponents. During the same period when Great Britain championed and enforced the three-mile rule, it acted to preserve its ability to assert jurisdiction beyond three miles when it suited its needs.[161] For example, during the eighteenth and nineteenth centuries, the English Hovering Acts asserted customs jurisdiction beyond the three-mile range.[162] And in legislation and treaty-making during the late nineteenth century, England was careful not to commit itself to the three-mile rule generally, and to preserve its rights to assert jurisdiction beyond the three-mile limit with respect to certain fishing rights, bays, folded coasts, pearls, and coral banks.[163] Similarly, the United

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[160] Compare William Edward Hall, *A Treatise on International Law* 216 (Clarendon 7th ed 1917) ("[T]he state is . . . indifferent to . . . what happens among a knot of foreigners so passing through her [territorial sea] as not to come in contact with the population. To attempt to exercise jurisdiction in respect of acts producing no effect beyond the vessel, and not tending to do so, is of advantage to no one.").

[161] See Riesenfeld, *Protection of Coastal Fisheries* at 131, 148-54 (cited in note 134). See also Fulton, *The Sovereignty of the Sea* at 651-52 (cited in note 139) (Great Britain has "taken pains to make it clear that in adopting a three-mile limit for particular purposes they do not abrogate their right to the farther extent of sea that may be necessary for other purposes.").

[162] England repealed the Hovering Acts in the late nineteenth century but did not fully eliminate its authority to assert customs and related jurisdiction over foreign ships beyond three miles. See Riesenfeld, *Protection of Coastal Fisheries* at 131, 142 (cited in note 134).

[163] This point is detailed in id at 148-71. Four prominent examples of this phenomenon are: (1) England's 1878 Territorial Waters Jurisdiction Act provided that criminal jurisdiction would be exercised for three miles to the sea, but also preserved jurisdiction beyond the three-mile range "as is necessary for the defence and security of such dominions." Id at 148. (2) Over England's objections, the 1881 North Sea Fisheries Convention included a three-mile rule for fishing rights. England resisted the explicit three-mile rule in order to maintain flexibility to protect the burgeoning trawling fishing practice of its citizens on foreign coasts. See id at 152. The English implementing statute made clear that the three-mile zone only extended to matters explicitly included within the treaty, and that England maintained jurisdiction beyond the three-mile zone in a variety of contexts. See id at 149-52. (3) The Scotch Herring Fishery Act of 1889, which prohibited certain forms of trawling

States protested Russian restrictions on sealing beyond three miles in the Bering Sea when Russia owned the sea. But after the cession of Alaska to the United States in 1867, the United States, pursuant to an act of Congress asserting U.S. dominion over the entire Bering Sea, seized seal hunters in the Sea beyond the three-mile limit.[164] This is one of many examples of the United States "var[ying] her principles and claims as to the extent of territorial waters, according to her policy at the time."[165] These phenomena show that, as in the other case studies, nations will assert changing and inconsistent readings of CIL consistent with their interests.

Throughout the period, the greatest clashes over territorial jurisdiction concerned the area of water to which a nation's citizens would have exclusive fishing rights. Coastal nations with weak navies sought to maximize the breadth of exclusive fishing rights; nations with powerful navies sought to minimize the scope of exclusivity. There was little stability in actual practice.

As one would expect from their proximity and shared body of narrow water, England and France (and to a lesser degree England and Belgium, and England and Holland) frequently clashed over the three-mile rule for fishing.[166] To the extent that the three-mile rule was effectively embraced, it was done so by virtue of carefully negotiated bilateral and multilateral treaties rather than customary practice, yet even these treaties were frequently violated. Both sides captured ships of the other that were fishing beyond the three-mile limit, and both sides had ships that fished within the other's three-mile limit. To be sure, the history was not one of unremitting chaos. There were short periods in which two nations engaged in what might be called cooperative behavior, almost invariably pursuant to a treaty. One explanation for such cooperation is that two states with access to a fishery find themselves in a bilateral repeat prisoner's dilemma, and when conditions are favorable, cooperation will occur. Consistent with

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beyond the three-mile limit in Moray Firth (a "firth" is a Scotch term for a long, narrow sea inlet), and under which numerous Norwegian boats fishing beyond three miles (including British fishermen registered under the Norwegian flag) were prosecuted. See id at 158-60. The British government eventually returned the fines and released the ships' masters, but only after Norway agreed to prevent Norwegian trawlers from entering Firth, and not because of a rule of CIL. Id at 158-60; Meyer, *Jurisdiction in Coastal Waters* at 142-43 (cited in note 139). But see Jessup, *Territorial Waters* at 430-36 (cited in note 129) (claiming that the three-mile CIL rule was vindicated in Moray Firth controversy). (4) England consistently asserted jurisdiction beyond three miles for purposes of sedentary fishing, such as pearls and coral. See Jessup, *Territorial Waters* at 13-17.

[164] See Jessup, *Territorial Waters* at 54-57 (cited in note 129).

[165] Fulton, *The Sovereignty of the Sea* at 650 (cited in note 139).

[166] This paragraph draws heavily on the account in id at 605-50.

this theory, the most successful instances of cooperation—such as the harvesting of oysters—occurred when both sides would clearly be harmed by over-exploitation, and violations were relatively easy to identify.

Similarly, Spain and Russia tried to assert fishing rights beyond the three-mile zone. Sometimes, they succeeded. More often, they were met with threats of force from England and the United States, and backed away to defend only a three-mile band. This is thought by some to evidence a rule of CIL. A better explanation is that England and the United States had much stronger navies and powerful interests in maximizing areas in which their nationals could fish. It is not surprising that nations with powerful navies would tend to desire the narrowest possible territorial sea, and would usually get their way.

The only puzzle is why the United States and England recognized even a three-mile territorial sea. The answer is likely that neither the United States nor England was powerful enough both to provide safe passage to their civilian fishing vessels along the coast of a hostile power and to defend their fishing vessels close to home. Most states have a stronger interest in protecting their own coastal seas than in maintaining rights for their ships in distant seas for the simple reason that their fishing industry can more cheaply harvest the coastal seas, which are close to shore, than distant seas. In addition, it is considerably easier to defend coastal seas, both by ship and from the shore, than to maintain power over a distant sea.

Thus, every state of roughly similar power has a strong interest in agreeing not to interfere with the coastal fisheries of other states in return for a commitment not to interfere with their own coastal fisheries. The only problem—which is characteristic of such games—is coordinating on a particular area. What is needed is a focal point. Any band defined by a constant distance from the coastline is more simple, more "focal," than the alternatives, such as particular longitudes and latitudes. So it is no surprise that the fights about defining the territorial sea for fishing purposes was couched in terms of band widths. That the three-mile rule was frequently invoked during the period in question can be explained by the fact that three miles comported with the eighteenth century cannon-shot mark—the rough distance from which a nation could protect its seas from shore.[167] But, of

[167] Compare id at 694 ("It must not be forgotten that the three-mile limit was selected . . . because it had been already recognized and put into force in connection with the rights of neutrals and belligerents in time of war, as representing the approximate range of guns

course, states would have different interests over the size of the band, as the optimal size for each state would vary according to local technologies, economic needs, and types of fish available; here we would expect the powerful states to prevail over the weak states.[168]

Finally, the fishing example illustrates how various exogenous shocks led to changes in behavior. A prominent example was trawling, a late nineteenth century development.[169] Trawling was a profitable but destructive form of fishing; trawling just outside the three-mile band disrupted fishing within the band much more than prior fishing methods. The rise of the steamship (also late nineteenth century) made trawling possible at much farther distances. These developments heightened conflicts over fishing zones and precipitated the expansion of asserted and defended fishing zones early in the twentieth century.[170] It also explains why England began to hedge on its formal assertion of the three-mile rule in the late nineteenth century. England wanted to assert trawling broadly abroad but protect fisheries at home. This led it to refrain from asserting a well-defined rule, relying instead on standards that it—the preeminent naval power—could interpret flexibly to suit its needs.

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at the time.").

[168] This game can be viewed as a Battle of the Sexes: every state had an interest in a free coastal area, but different states preferred larger or smaller coastal areas. To take a simple example, suppose that state X specializes in a certain kind of fishery x, which extends from its shore to two miles from state Y's shore. State Y specializes in fishery y, which extends from its shore to three miles from X's shore. Each state would also like to fish from the fishery in which it does not specialize. In the absence of coordination, both states would fish from both fisheries, leading to exhaustion. If they could coordinate by agreeing to specialize in one fishery, exhaustion would be avoided, but such coordination would be difficult to monitor. A territorial sea rule would be easier to monitor, but each state has an interest in a different rule. X prefers a two-mile rule, because this would allow it to exploit its entire fishery; and Y prefers a three-mile rule, because this would allow it to exploit its entire fishery plus some of fishery x. Either rule could be an equilibrium, but as relative power changes, the loser under the existing rule is likely to challenge it and seek by treaty a change to the rule that it favors. See text accompanying notes 185-186.

[169] On this point see Fulton, *The Sovereignty of the Sea* at 698-703 (cited in note 139); Riesenfeld, *Protection of Coastal Fisheries* at 152-55 (cited in note 134).

[170] As Brown notes of the state of affairs before trawling:

> Given the technology of the period, there was little significant conflict between the interests of coastal communities in the fish stocks adjacent to the coast and those of foreign, distant-water fishing States, and, in any event, even if there had been an awareness of such conflict, the number of independent coastal States so affected would have been so small and their power and lack of co-ordination such that no serious challenge to freedom of fishing could possibly have been mounted.

E.D. Brown, 1 *The International Law of the Sea* 8 (Dartmouth 1994).

Another example of how exogenous shocks can change behavior: as more nations gained independence, the behavioral regularities became less common.[171] Cooperation and coordination become exponentially more difficult as the number of participants increases. Although a rule may evolve that governs fishing among a few large states, it is unlikely that a rule could evolve to foster cooperation or coordination among dozens of states.[172]

The CIL of the territorial sea was never uniform and never static. Nations followed different behavioral patterns in different maritime contexts, in accordance with their interests and power. Behaviors changed during relatively short periods of time. The ostensible three-mile rule did little, if any, work in affecting the actual behavior of nations. Sometimes one nation had an interest in asserting jurisdiction beyond the three-mile limit, and no other nation had an interest in preventing this act. This was coincidence of interest. Other times a nation tried to assert jurisdiction but was met by a threat of retaliation from a more powerful nation. This was coercion. In yet other contexts, nations engaged in mutually beneficial cooperative behavior by refraining from exercising jurisdiction beyond a three-mile limit. This can be seen as a prisoner's dilemma or a coordination game. The many puzzles, inconsistencies, or "violations" that appear under the traditional view make sense when viewed through the lens of the various and changing interests at stake.

Rather than following an exogenous rule, then, states acted in their self-interest, and their behavior changed as their interests changed. In arguing for a rule of CIL, jurists commit the fallacies of (a) inducing a rule of CIL from a few cases that amount to a behavioral regularity in a specific context during a short period of time; (b) labeling behavioral patterns inconsistent with the ostensible rule as "exceptions" or "comity"; (c) viewing a coincidence of interest or coercion situation as evidence of cooperation; and (d) analyzing behavioral patterns without considering the different underlying logics that these patterns exemplify.

IV. EXTENSIONS

In this Section, we extend the theory beyond CIL to consider its implications for related issues. We consider domestic constitutional arrangements for identifying and enforcing CIL, and the relevance of our analysis for treaties and international human rights law.

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[171] See id.

[172] See text accompanying note 42.

A. National Interests and the Domestic Enforcement of CIL

Our theory of CIL explains multinational behavioral regularities as a function of national self-interest. This assumption is a simplification. A nation's self-interest is a complex amalgam of the interests of citizens and institutions.[173] We have skirted this problem by relying on the assessment of the national interest identified by a nation's political leadership. Every form of government overcomes the many difficulties in determining the national interest in foreign affairs by delegating the task to national political figures. We do not claim that national political leaders accurately identify the national interest, only that they do so definitively.[174]

National political leaders determine a nation's views about the content of CIL and order national actions that either contribute to or defy the behavioral regularities that are said to constitute CIL. Sometimes, however, national commitments related to CIL will require domestic enforcement by courts. For example, when the political branches incorporate their views about CIL into a treaty, statute, or executive agreement, courts enforce these enactments. Courts will apply a domestic statute or treaty even in the face of the claim that the enactment violates CIL. In the courts' view, the political branches' official statements about the content of CIL trump all other sources of CIL.[175]

It is often the case, however, that courts apply CIL without any guidance from the political branches. The political branches may specify in a treaty or statute that CIL controls a particular issue, but not specify the content of the CIL rule. Or courts may apply CIL directly, as "part of our law," even in the absence of any incorporation by the political branches.[176] In these contexts,

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[173] For discussions, see Peter B. Evans, Harold K. Jacobson and Robert D. Putnam, eds, *Double-Edged Diplomacy: International Bargaining and Domestic Politics* (California 1993); Robert O. Keohane, *Theory of World Politics: Structural Realism and Beyond*, in Robert O. Keohane, ed, *Neorealism and its Critics* 182-83 (Columbia 1986); Putnam, 42 Intl Org at 427 (cited in note 46); and James N. Rosenau, *National Interest*, in David L. Sills, ed, 11 *International Encyclopedia of the Social Sciences* 34 (MacMillan 1968).

[174] As liberal internationalists are quick to point out, international relations broadly conceived are carried out by numerous governmental and nongovernmental actors operating at a variety of levels and contexts. See, for example, Slaughter, Tulumello and Wood, 92 Am J Intl L at 382-83 (cited in note 2). We have no quibble with this point, which does not have much relevance to CIL considered alone. The identification and application of CIL is performed primarily by governmental actors in accordance with a strict hierarchy of authority. In this Section we are trying to explain how that hierarchy is consistent with, and informed by, our theory.

[175] See Restatement (Third) § 112, comment c. See also Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L Rev 665, 684-707 (1986).

[176] Today, courts tend to apply CIL as domestic law in the absence of apparent legisla-

courts must determine the content of CIL and enforce it. Two positive claims about this practice follow from our theory.

The first is that courts would obey informal instructions by their political leaders about the content of CIL. This is in fact the practice, at least in the United States.[177] The Supreme Court's decision in *The Paquete Habana* is a rare counterexample that proves the rule.[178] There the Admiral of the Navy, with the apparent approval of the Secretary of the Navy, justified the seizure of a fishing smack on the grounds that the smack had a "semi-military character" and contained excellent sailors who might assist the Spanish cause.[179] In its brief to the Court, the executive branch argued, among other things, that the seizure had a military justification.[180] In rejecting this argument, the Court may have been influenced by the fact that the President had proclaimed that the United States would conduct the war consistently with "the law of nations" and "the present views of nations."[181] Nonetheless, *The Paquete Habana* is an exception to the usual pattern, an exception that is rarely if ever repeated.[182]

Second, in the absence of executive guidance, our theory suggests that the court is in effect deputized to apply CIL in accordance with the national interest. The court looks to all the paraphernalia of the jurisprudence of CIL—the treatises and the history books, the UN resolutions and the pronouncements of executives, the formal understandings, and the unratified treaties. But this chore can serve two different purposes. When the court is confident that it can determine which course of action is in the national interest, it will use CIL to rationalize the result. Biased national court interpretation of international law is a well-known phenomenon.[183] When a court is uncertain about what is in the

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tive authorization only in human rights cases involving foreign officials. See Curtis A. Bradley and Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L Rev 319, 328 (1997).

[177] See Trimble, 33 UCLA L Rev at 684-707 (cited in note 175); Restatement (Third) at § 112, comment c. In the rare cases that a court does not, the political branches retain the power to overrule the court's determination of CIL for future cases. See Restatement (Third) at § 326, comments a-d.

[178] 175 US 677 (1900).

[179] See Jordan J. Paust, Paquete *and the President: Rediscovering the Brief for the United States*, 34 Va J Intl L 981, 982 n 6 (1994).

[180] Brief for the United States No 395, *The Paquete Habana* 17, 23, 32-33 (Oct Term 1899).

[181] *The Paquete Habana*, 175 US at 712.

[182] See Trimble, 33 UCLA L Rev at 724-25 (cited in note 175) (citing many examples).

[183] For modern examples, see *Sale v Haitian Centers Council, Inc*, 509 US 155, 170-88 (1993); *Volkswagenwerk Aktiengesellschaft v Schlunk*, 486 US 694, 698-708 (1988); *Société Nationale Industrielle Aérospatiale v US District Court for the Southern District of Iowa*, 482 US 522, 541-46 (1987).

national interest, it can read the indicia of CIL to try to make a more objective determination of dominant pertinent behavioral regularities. It does so not because CIL is binding in any real sense, but rather because the regularities reveal information about what other states have done in like circumstances and thus serve as evidence about what the host state's interest may be in the case at hand.[184]

B. Treaties

As we explained above, CIL may describe international behavior in a bilateral repeat prisoner's dilemma, but this is possible only under special conditions. Among other things, it is necessary that states be able to recognize when an action is cooperative and when an action is not. Sometimes, the status quo will supply a focal point. For example, at time 0, states do not seize the fishing vessels of other states because their navies have more valuable opportunities; at time 1, these opportunities disappear and a prisoner's dilemma comes into existence. If each state persists in the status quo, and does not seize a fishing vessel, then as long as all of the conditions for cooperation in a repeat game are met, a CIL norm against seizing fishing vessels can develop. By contrast, if states seize each other's fishing vessels at time 0, there is no natural way to coordinate a cessation. If one state refrains from seizing the vessels of the other, as a way of suggesting to the other state that joint restraint would be a superior alternative, the other state might misinterpret this action as a change in the first state's payoffs rather than as an offer to cooperate. If so, the other state will continue to seize the vessels of the first state.

An obvious solution to this problem is communication. If the first state announces that it will discontinue seizure of fishing vessels, but only as long as the other state does the same, the second state will not misinterpret the first state's actions. It might not believe the first state's commitment, but it will understand it. If it does understand the commitment, it may desist as well and cooperation will result.

In most circumstances, however, optimal cooperation is complex. State i might be willing to stop seizing the fishing vessels of state j, but only as long as it is certain that the crews of the vessels are not spying on state i's military operations or transporting

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[184] A similar rationale may explain the *Charming Betsy* canon of construction, which requires courts to interpret statutes to be consistent with international law when possible. On this canon, see Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Georgetown L J 479 (1998).

weapons. Thus, state i might insist that "cooperation" in this game means allowing each state to stop and search fishing vessels and to detain them if they present a threat. In the absence of communication, state j might interpret such unilateral action by state i as a violation of the focal understanding not to seize fishing vessels. Communication allows states to engage in optimal cooperation, rather than engaging in moderately valuable actions that are dependent on focal points that already exist. Communication allows states to create new focal points.

We hypothesize that this is a primary function of many treaties. A treaty can record the actions that will count as cooperative moves in an ongoing repeat prisoner's dilemma or the actions that achieve the highest joint payoff in a coordination game. On this view, the treaty itself does not have independent binding force. States refrain from violating treaties (when they do) because they fear retaliation from the treaty partner(s), or because they fear a failure of coordination, not because they feel an obligation. In repeat prisoner's dilemmas, when the treaty sets out clearly what counts as a cooperative action, it becomes more difficult for a state to engage in opportunism and then deny that the action violated the requirements of a cooperative game.[185] In coordination games, when the treaty sets out what the coordinating action is, it becomes less likely that a failure of coordination will occur because of error. Treaties might also facilitate cooperation or coordination—even, potentially, in multinational contexts—by establishing organizations that generate information, facilitate communication and negotiation, structure interactions, and provide the institutional mechanisms needed to enforce selective incentives for national action.[186] Anticipating these potential benefits, states rationally send representatives to meet and negotiate treaties.

We do not mean to suggest that all, or even most, treaties facilitate cooperation or coordination. Some treaties might simply reflect the underlying interests of powerful nations (and thus be examples of coercion),[187] and other treaties might require "only

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[185] Lipson makes a related claim, arguing that states enter into treaties in order to evidence the seriousness of their claims. He maintains that treaties are more public than informal agreements, so violation of a treaty injures a state's reputation more than violation of other agreements. See Charles Lipson, *Why are some international agreements informal?*, 45 Intl Org 495, 502-08 (1991).

[186] See Kenneth W. Abbot and Duncan Snidal, *Why States Act through Formal International Organizations*, 42 J Conflict Resol 3, 4-5 (1998); William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 Am U J Intl L & Pol 227, 240-56 (1997).

[187] See John Mearsheimer, *The False Promise of International Institutions*, 19 Intl Security 5 (1995); Joseph M. Grieco, *Anarchy and the limits of cooperation: a realist critique*

modest departures from what [nations] would have done in the absence of an agreement"[188] (and thus be examples of coincidence of interest).

We lack space to pursue these ideas further here. We mention them only to show how our theory of CIL would cohere with a theory of treaties, the essential point being that treaties, like CIL, can emerge endogenously from the rational behavior of states. CIL is the label attached to behavioral regularities that emerge in various strategic settings; treaties may be labels attached to certain pronouncements that emerge in various strategic settings. These pronouncements, like behavioral regularities, occur because states believe the pronouncements serve their interests.[189] The main difference between the two forms of law is that CIL evolves in the absence of clear and authoritative communication between interested states, which makes it difficult to achieve cooperation or coordination, whereas treaties are a product of authoritative communication and thus are more likely than CIL to produce cooperation or coordination.

C. International Human Rights Law

Thus far we have examined traditional rules of CIL that regulate *inter*-national relations. Following the Holocaust, the international community expanded the focus of international law to include governance of the way a nation treats its citizens. Since World War II, nations have signed scores of multilateral human rights treaties that purport to regulate the way they treat their citizens with regard to such issues as genocide, torture, and various civil rights.[190] These treaties are, in effect, promises by one nation to other nations that it will protect the human rights of its citizens. And these treaties, in turn, are said to give rise to a flourishing CIL of human rights.[191]

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of the newest liberal institutionalism, 42 Intl Org 485, 497-98 (1988).

[188] George W. Downs, et al, *Is the good news about compliance good news about cooperation?*, 50 Intl Org 379, 380 (1996).

[189] Setear uses the idea of the repeat prisoner's dilemma to explain treaties. See John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 Harv Intl L J 139 (1996). Setear's main point is that treaties contain mechanisms that enhance the incentive to cooperate in repeat prisoners' dilemmas.

[190] For an overview, see Richard Pierre Claude and Burns H. Weston, eds, *Human Rights in the World Community: Issues and Action* (Pennsylvania 1989); Richard B. Lillich and Hurst Hannum, *International Human Rights: Problems of Law, Policy and Practice* (Little, Brown 3d ed 1995).

[191] See Bradley and Goldsmith, 66 Fordham L Rev at 328 (cited in note 176).

This CIL of human rights differs in many respects from traditional CIL.[192] The central relevant difference for our purposes is that, in contrast with received wisdom about traditional CIL, the new CIL of human rights makes no pretense of reflecting a universal behavioral regularity. The CIL of human rights thus raises two questions that call for explanation. First, why is there such a gap between what the law requires and the actual behavior of nations? (This question is often phrased in terms of international human rights law's poor enforcement record.) Second, what accounts for the fact that some CIL prohibitions—for example, the prohibition on genocide—do appear to track a general behavioral regularity?

We begin with the exceptional case, the CIL prohibition on genocide. Some nations in history have committed genocide, but most nations most of the time do not.[193] Some might view this behavioral regularity, in combination with many pronouncements (such as the Genocide Convention[194]), as evidence that nations respect the prohibition on genocide as a legal obligation. This account is consistent with the behavioral pattern but cannot explain violations of the norm or offer reasons why nations appear to comply with it. A better explanation is that the absence of genocide reflects a coincidence of interest. Both before and after the development of the ostensible international law prohibition in this century, nations rarely committed genocide. Most nations lack any reason to commit genocide, and even nations with a reason to do so find it very costly in military, economic, or moral terms.

Now consider cases in which nations do have a reason to abuse their citizens.[195] Governments often find it useful to torture certain individuals, or to deny to citizens certain civil rights such as freedom of speech. Nations that commit human rights abuses highlight the gap between the law and the actual behavior of nations. This gap between law and practice makes sense under our theory.

We certainly would not expect to see cooperation on this issue. Consider a world of two nations: A, which abuses its citizens,

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[192] For an overview, see Bradley and Goldsmith, 110 Harv L Rev at 838-42 (cited in note 9).

[193] For a historical survey, see Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (Yale 1990).

[194] See Convention on the Prevention and Punishment of the Crime of Genocide, [1948] 78 UNTS 277, TIAS No 1021 (1951).

[195] We are not suggesting here that human rights abuses are ever morally justifiable. We are simply describing the cases when nations believe that they have reason—on moral, political, economic, or any other ground—to commit human rights abuses.

and B, which does not. A gains nothing but loses something if both nations agree to stop abusing citizens. The same is true for B if both A and B abuse their citizens. They lose something and gain nothing from a mutual agreement to provide greater protection to their citizens. Cooperation is obviously no more likely among multiple nations. Assuming for the moment an absence of coercion (i.e., selective incentives such as forgone economic aid, threat of military intervention, or diplomatic ostracization), a nation that violates its citizens' human rights will have no incentive to comply with more restrictive international human rights norms.

This all suggests that we would expect nations not otherwise inclined to protect human rights to abide by international human rights law only if other powerful nations enforce compliance.[196] Consider the international slave trade. By the end of the nineteenth century, the slave trade had all but died out. The behavioral regularity of not trading slaves is best explained by the fact that Britain and, to a lesser degree, the United States developed national interests in abolishing the international slave trade, and enforced their will with the threat of military force.[197] We need not take a position in the debate whether religious, economic, or other reasons accounted for the British and American governments' decision to ban international slavery.[198] Whatever the reason for the change of national interest, a new behavioral regularity of not trading slaves arose because the United States and Britain punished or threatened to punish militarily those states which violated this interest.[199]

A similar coercion story explains the patterns of enforcement, and limited efficacy, of modern international human rights law. Consider the position of the United States, the world's leading enforcer of human rights. The United States sometimes has reason—grounded in domestic political factors and geopolitical concerns—to reduce a foreign nation's mistreatment of its citizens. But it is very costly for the United States to enforce international human rights, and it tends to do so in the two situations that present special enforcement incentives. The first occurs when one nation's human rights violations pose a significant adverse threat to the United States. This explains, for example, the United

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[196] See Stephen D. Krasner, *Sovereignty, Regimes, and Human Rights*, in Volker Rittberger, ed, *Regime Theory and International Relations* 139, 140-41 (Clarendon 1993).

[197] See id at 152-55.

[198] For a comprehensive examination of this issue, see Hugh Thomas, *The Slave Trade: The Story of the Atlantic Slave Trade 1440-1870* 449-785 (Simon & Schuster 1997).

[199] See Krasner, *Sovereignty, Regimes and Human Rights* at 154-55 (cited in note 196).

States intervention in Haiti (to avoid a domestic crisis in Florida). A second context where we find human rights enforcement is when the federal government receives domestic political benefits from enforcement, and the costs of such enforcement—in economic or military terms—are low. Examples of this phenomenon are U.S. economic sanctions against weak and unpopular countries like Cuba and Myanmar. In general, the United States will not enforce human rights if enforcement is costly and the strategic benefits of enforcement are low or uncertain. This explains the absence of human rights law enforcement against China (a powerful military and economic foe) and Saudi Arabia (an important ally).[200]

This enforcement pattern—against weak foes but not against strong foes or friends—is consistent with the claim that the efficacy of human rights law tracks the enforcement interests of powerful nations. So too is the fact that the core international human rights, and the ones most widely embraced, mirror the rights protected by the United States Constitution.[201] Also consistent with the coercion story is the fact that at the same time the United States is enforcing human rights law abroad, it is thumbing its nose at international human rights law at home.[202] Although United States domestic law provides abundant protections for human rights, many practices in the United States—the juvenile death penalty, prison and police standards, and certain immigration acts—might fall below the requirements of international human rights law.[203] But the United States resists application of this law to itself. It has been slow to assent to human rights treaties, and when it does assent it attaches reservations and declarations that render the assent meaningless.[204] And while United States domestic law permits domestic enforcement

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[200] NATO's recent war with Yugoslavia is consistent with the enforcement pattern described in this paragraph. The bombing of Yugoslavia was motivated in part by the human rights abuses there. But it is no accident that the Western powers responded to human rights abuses in Southern Europe and not (for example) in Rwanda or Turkey or Chechnya. The enforcement in Yugoslavia was justified in order to prevent destabilization of the Balkans; and Western leaders thought this strategic aim could be accomplished in relatively inexpensive fashion.

[201] See Louis Henkin and Albert J. Rosenthal, eds, *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Columbia 1990).

[202] For descriptions of this practice, and different views about its legitimacy, see Jack L. Goldsmith, *International Human Rights Law and the United States Double Standard*, 1 Green Bag 2d 365 (1998); Amnesty International USA, *United States of America: Rights For All* (1998).

[203] See Amnesty International USA, *Rights For All* (cited in note 202).

[204] Id; Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am J Intl L 341 (1995).

of the CIL of human rights law against foreign diplomats, it does not permit enforcement of this law against domestic officials.[205] This behavior is easy to understand, for there is no nation able to enforce a more restrictive human rights regime against the United States.

We do not mean to suggest that high-profile military or economic sanctions by powerful governments are the only ways to enforce human rights law. Along many points of diplomatic and economic interaction, more subtle low-level sanctions can be brought to bear on nations that abuse their citizens. These sanctions are facilitated by international organizations devoted to exposing human rights abuses and organizing interest groups to encourage powerful nations to enforce human rights. These strategies make a difference, for some nations otherwise inclined to violate international standards do take steps to avoid exposure of illegal acts and engage in sporadic acts of compliance (such as releasing a dissident prisoner or announcing new human rights aspirations). But the difference is usually small, and is in any event fully explained by sanctions that can be brought to bear on recalcitrant nations rather than compliance with CIL.

CONCLUSION

CIL scholars are too optimistic about empirical reality and too pessimistic about theory. In this Article we have borrowed from two traditions in the international relations literature in an attempt to rectify both problems. The first tradition is realism. Realism emphasizes that states act rationally to further their perceived national interest, and that the distribution of national power determines international behaviors. Realism is skeptical about international cooperation and international law. By contrast, the second tradition—institutionalism—is more optimistic about international cooperation and international law. It argues that states acting rationally to further their own interests can sometimes overcome conflicts of interest to achieve mutually beneficial cooperative outcomes. But institutionalists put their faith in international organizations constituted by treaty that reduce transaction costs and information problems. They ignore CIL which, by definition, arises from decentralized and noninstitutionalized state acts.

We have applied the insights of both realism and institutionalism to explain CIL. Both the theory and the case studies sug-

[205] See Goldsmith, 1 Green Bag 2d at 366-69 (cited in note 202).

gest that when states achieve joint gains, the most plausible explanation can be found in the bilateral coordination and prisoner's dilemma models. Theory and the case studies also suggest that most instances of supposed cooperation are best explained as coincidence of interest or successful coercion. In short, CIL has real content, but it is much less robust than traditional scholars think, and it operates in a different fashion.